

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/STOP PRESS:
MORTGAGE REPOSSESSIONS (PROTECTION OF TENANTS ETC) ACT 2010

MORTGAGE (VOLUME 77 (2010) 5TH EDITION)

STOP PRESS:

The Mortgage Repossessions (Protection of Tenants etc) Act 2010 makes provision so as to protect persons whose tenancies are not binding on mortgagees and to require mortgagees to give notice of the proposed execution of possession orders. The Act received the royal assent on 8 April 2010 and comes into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up booklet.

Section 1 makes provision in respect of the power of the court to postpone the date for delivery of possession of a property where a mortgagee under a mortgage of land, which consists of or includes a dwelling-house, brings an action in which the mortgagee claims possession of the mortgaged property and there is an unauthorised tenancy of all or part of the property. By virtue of s 2, where a mortgagee under a mortgage of land, which consists of or includes a dwelling-house, obtains an order for possession of the mortgaged property, the order may be executed only if the mortgagee gives notice at the property of any prescribed step taken for the purpose of executing the order, and only after the end of a prescribed period beginning with the day on which such notice is given. Section 3 deals with interpretation. Section 4 deals with commencement, extent and the short title.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/101. Meaning of 'mortgage'.

1. DEFINITION AND CLASSIFICATION

(1) IN GENERAL

101. Meaning of 'mortgage'.

A mortgage is a disposition of property as security for a debt. It may be effected by a demise or sub-demise of land¹, by a transfer of a chattel², by an assignment of a chose or thing in action³, by a charge⁴ on any interest in real or personal property⁵ or by an agreement to create a charge⁶, for securing money or money's worth, the security being redeemable on repayment or discharge of the debt or other obligation⁷. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself or from any other instrument or from oral evidence, it is considered as a mortgage and redeemable⁸.

1 See PARA 187 et seq.

2 See PARA 231.

3 See PARA 232.

4 For the purposes of the Law of Property Act 1925, 'mortgage' includes any charge or lien on any property for securing money or money's worth: s 205(1)(xvi). As to the distinction between a mortgage or charge and a lien see PARA 113.

5 Cf the Law of Property Act 1925 s 205(1)(xx), by which 'property' includes any thing in action, and any interest in real or personal property. See also *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

6 See PARA 239.

7 *Santley v Wilde* [1899] 2 Ch 474, CA, per Lindley MR; *Noakes & Co Ltd v Rice* [1902] AC 24 at 28, HL. As to the position where the property is situated abroad see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 396.

8 Co Litt 205a note; *Maxwell v Lady Mountacute* (1719) Prec Ch 526; *Cripps v Jee* (1793) 4 Bro CC 472; *Sevier v Greenway* (1815) 19 Ves 413. See also PARA 108.

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102. Characteristics of a mortgage.

A mortgage consists of two things, namely a personal contract for payment of a debt and a disposition or charge of the mortgagor's estate or interest as security for the repayment of the debt; in equity the estate or interest so transferred is no more than a pledge or security¹. Every mortgage implies a debt and a personal obligation by the mortgagor to pay it². If there is a covenant or bond for its payment it is a specialty debt; if not, it is a simple contract debt³. A mortgagee has an insurable interest⁴. Covenants in a mortgage are subject to the doctrine against restraint of trade⁵.

1 *Quarrell v Beckford* (1816) 1 Madd 269 at 278 per Plumer V-C.

2 *King v King* (1735) 3 P Wms 358; *Sutton v Sutton* (1882) 22 ChD 511 at 515, CA.

3 *King v King* (1735) 3 P Wms 358; *Duke of Ancaster v Mayer* (1785) 1 Bro CC 454 at 464; *Yates v Aston* (1843) 4 QB 182. As to covenants for payment see PARA 208.

4 As to property insurance see **INSURANCE** vol 25 (2003 Reissue) PARA 612; and as to marine insurance see **INSURANCE** vol 25 (2003 Reissue) PARA 378.

5 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL (provision of a tying covenant in a mortgage held unenforceable as being an unreasonable restraint of trade). As to restraint of trade see **COMPETITION** vol 18 (2009) PARA 377 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/103. Validity of charge on mortgagor's whole estate.

103. Validity of charge on mortgagor's whole estate.

A charge created by a mortgage and extending to the whole of the mortgagor's real and personal property, whether present or future, may possibly be unenforceable as such, either on the ground that it is too vague to be enforced or on the ground that it is contrary to public policy that a person should be allowed to deprive himself of the whole of his livelihood¹. Such a charge is, however, enforceable if it can be construed as confined to property existing at the date of the granting of the charge and ascertainable at the date when it is sought to enforce it².

Moreover, if the charge extends to future property but the particular types of property included in the general charge are separately specified, the charge may be treated as divisible³ and enforced against after-acquired property which falls within a particular class so specified and is ascertainable at the date when it is sought to enforce the charge⁴.

1 See *Re Clarke, Coombe v Carter* (1887) 36 ChD 348 at 352-353, 355, CA; *Re Turcan* (1888) 40 ChD 5 at 9, CA (covenant to settle after-acquired property); *Re Kelcey, Tyson v Kelcey* [1899] 2 Ch 530 at 532-534; *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130, DC, where the possibility was discussed.

2 *Re Kelcey, Tyson v Kelcey* [1899] 2 Ch 530 (agreement to charge all debtor's real and personal estates; charge enforceable against money becoming payable under assurance policy to which debtor was entitled at date of charge).

3 *Re Clarke, Coombe v Carter* (1887) 36 ChD 348, CA. See also *Re Turcan* (1888) 40 ChD 5, CA.

4 *Re Clarke, Coombe v Carter* (1887) 36 ChD 348, CA (money to which mortgagor might become entitled under will); *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130, DC (charge of all income and estate; charge divisible and enforceable against income). See also *Tailby v Official Receiver* (1888) 13 App Cas 523, HL (assignment of future book debts); *Re Turcan* (1888) 40 ChD 5, CA. As to the assignment of after-acquired property by way of security see also PARA 142.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/104. Legal mortgages.

104. Legal mortgages.

A legal mortgage of personal property is a conditional assignment to the mortgagee of the mortgagor's legal interest in it¹. A legal mortgage of land or an interest in land must be by deed². A legal mortgage of an estate in unregistered land is effected by a charge by deed expressed to be by way of legal mortgage or a demise or sub-demise for a term of years absolute³. The effect of a legal mortgage by demise is to vest the legal estate in the term of years created by it in the mortgagee, who, unless the deed expressly provides for possession by the mortgagor until default, is immediately entitled upon the execution of the deed to possession of the property⁴; but the mortgagor's legal estate in the reversion of the term of years is not transferred to the mortgagee until the right of redemption is destroyed by foreclosure or sale or otherwise⁵. A legal charge does not vest any estate in the mortgagee, but creates a legal interest which confers on the mortgagee the same protection, powers and remedies as a mortgage by demise⁶. A mortgage of registered land can be made only by a charge by deed expressed to be by way of legal mortgage or by charging the estate with the payment of money, and cannot be made by way of mortgage by demise⁷.

1 In the Law of Property Act 1925, 'legal mortgage' means a mortgage by demise or sub-demise or a charge by way of legal mortgage, and 'legal mortgagee' has a corresponding meaning; 'mortgage money' means money or money's worth secured by a mortgage; 'mortgagor' includes any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate interest or right in the mortgaged property; 'mortgagee' includes a chargee by way of legal mortgage and any person from time to time deriving title under the original mortgagee; and 'mortgagee in possession' is a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property: s 205(1)(xvi). As to the meaning of 'mortgage' see PARA 101 note 4; and as to the meaning of 'property' see PARA 101 note 5. As to mortgages of personalty see PARAS 231-237. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1674 et seq.

2 See the Law of Property Act 1925 s 52(1); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 14. In the Law of Property Act 1925, 'land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; and also includes a manor, an advowson, a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over, or derived from land; 'mines

and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting them; 'manor' includes a lordship and reputed manor or lordship; and 'hereditament' means any real property which on an intestacy occurring before 1926 might have devolved upon an heir: s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

3 See the Law of Property Act 1925 ss 85(1), 86(1); and PARAS 190-191. Formerly the legal mortgage of real property was, as the legal mortgage of personal property still is, a conditional assurance: see PARA 187.

4 As to the mortgagee's right to possession see PARAS 338, 402 et seq.

5 As to the equity of redemption or right to redeem see PARA 302 et seq.

6 See the Law of Property Act 1925 s 87(1); and PARA 191. See also *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402 at 433, [1965] 3 All ER 673 at 680, CA, per Harman LJ.

7 See the Land Registration Act 2002 s 23(1); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 906-907.

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105. Equitable mortgages.

An equitable mortgage is a specifically enforceable contract to create a legal mortgage¹. It creates a charge on the property but does not convey any legal estate or interest to the creditor; such a charge amounts to an equitable interest². Its operation is that of an executory assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the court's equitable jurisdiction³. An equitable mortgagee may elect to dispense with the mortgage and rely only on his charge, realisable by sale⁴.

As a general rule all property, whether real or personal, which may be the subject of a legal mortgage can equally be charged in equity⁵: an equitable mortgage may be made by a mortgage of an equitable interest⁶, by an agreement to create a legal mortgage⁷, or by a mortgage which fails to comply with the formalities for a legal mortgage⁸. A mere deposit of title deeds is not effective to create an equitable mortgage over land⁹.

1 *Swiss Bank Corpn v Lloyds Bank Ltd* [1982] AC 584, [1980] 2 All ER 419, CA; affd [1982] AC 584, [1981] 2 All ER 449, HL.

2 In the Law of Property Act 1925, 'equitable interests' means all interests and charges in or over land other than legal estates (see **REAL PROPERTY** vol 39(2) (Reissue) PARA 114 et seq); and 'legal estates' means the estates, interests and charges in or over land, subsisting or created at law, which are by that Act authorised to subsist or to be created as legal estates (see **REAL PROPERTY** vol 39(2) (Reissue) PARAS 91-113): s 205(1)(x) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). See eg *Re Sharland, Kemp v Rozey (No 2)* (1896) 74 LT 664, CA.

3 See *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 311, [1993] 3 All ER 626 at 633, PC. See also **EQUITY** vol 16(2) (Reissue) PARAS 606-607.

4 *Kennard v Futvoye* (1860) 2 Giff 81 at 94; *Matthews v Goodday* (1861) 8 Jur NS 90. See also *Parker v Housefield* (1834) 2 My & K 419 at 422; *King v Leach* (1842) 2 Hare 57. As to orders for sale see PARA 616 et seq.

5 *Winter v Lord Anson* (1827) 3 Russ 488 at 493. As to legal mortgages see PARA 104.

6 See PARA 238.

7 See PARA 239.

8 See PARA 240.

9 See *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; and PARA 118.

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106. Equitable charges.

An equitable charge arises where a particular asset or class of assets is appropriated to the satisfaction of a debt or other obligation of the chargor or a third party, so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability¹. This right creates a transmissible interest in the asset². It is a security interest created without any transfer of title or possession to the beneficiary, which can be created by an informal transaction for value and over any kind of property³.

An equitable charge on land is a security which does not create a legal estate, but only confers an equitable interest in the land upon the creditor⁴. It entitles the holder to have the property comprised in it sold by an order of the court⁵ to raise the money charged on it, but, in the absence of any express provision to that effect, it does not amount to an agreement to give a legal mortgage⁶, although it may, if duly registered⁷, take priority over a legal estate⁸. It may be created expressly⁹, or may arise where a mortgagor purports to mortgage a greater estate in property than that which he possesses¹⁰.

Unlike an equitable charge of land, an equitable charge of a chose or thing in action usually takes the form of an assignment of the property¹¹, but trust receipts, by which the borrowers agree that goods purchased with advances should be held by them as agents for and in trust for the bank, may create an equitable charge on the goods¹², and a letter may amount to an equitable assignment by way of security and therefore a charge on book debts¹³.

1 *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 507-508, [1997] 4 All ER 115 at 125, CA, per Millett LJ.

2 *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508, [1997] 4 All ER 115 at 125, CA, per Millett LJ.

3 *Re Cosslett (Contractors) Ltd* [1998] Ch 495, [1997] 4 All ER 115, CA. See also *Swiss Bank Corp'n v Lloyds Bank Ltd* [1982] AC 584, [1980] 2 All ER 419, CA (affd [1982] AC 584, [1981] 2 All ER 449, HL); *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155; *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289 (affd [1989] Ch 497, [1988] 3 All ER 702, CA); *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL; *Russell-Cooke Trust Co v Elliott* [2007] EWHC 1443 (Ch), [2007] 2 BCLC 637, [2007] All ER (D) 166 (Mar).

4 See PARA 105. The fact that an equitable charge is normally founded on contract distinguishes it from an equitable lien: see **LIEN** vol 68 (2008) PARA 814. See also **EQUITY** vol 16(2) (Reissue) PARA 607.

5 The mode of enforcing an equitable charge is normally sale, not foreclosure: see PARA 569.

6 *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1995] 2 All ER 973 (affd on different grounds [1997] Ch 107, [1996] 3 All ER 215, CA); *Murray v Guinness* [1998] NPC 79. See also *Matthews v Goodday* (1861) 31 LJCh 282; and **EQUITY** vol 16(2) (Reissue) PARAS 606-607.

7 As to registration of an equitable charge as a Class C land charge see the Land Charges Act 1972 s 2(1), (4)(iii); PARA 260.

8 See PARA 261.

9 As to the requirements for the creation of a valid equitable charge over land see PARA 241.

10 See PARA 194.

11 See **CHOSSES IN ACTION** vol 13 (2009) PARA 26. See also PARAS 238-239.

12 See *Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China, and Strauss & Co Ltd (No 2)* [1937] 4 All ER 651; cf *Re Nanwa Gold Mines Ltd, Ballantyne v Nanwa Gold Mines Ltd* [1955] 3 All ER 219, [1955] 1 WLR 1080, where subscribers had an equitable lien on funds paid by them and placed in a separate account. See also *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL; *Re Kayford Ltd* [1975] 1 All ER 604, [1975] 1 WLR 279.

13 See *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638. See also PARA 110; and **CHOSER IN ACTION** vol 13 (2009) PARA 26.

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107. Mortgageor's equity of redemption.

Incident to every mortgage is the right of the mortgageor to redeem¹, a right which is called his equity of redemption, and which continues notwithstanding that he fails to pay the debt in accordance with the proviso for redemption². This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate³. Any provision inserted in the mortgage to prevent redemption on payment of the debt or performance of the obligation for which the security was given is termed a clog or fetter on the equity of redemption, and is void⁴. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular time or to a particular description of persons⁵. This is especially illustrated in the case of mortgages by building societies⁶ where, although redemption is not contemplated for periods usually varying between 15 and 25 years, nevertheless the mortgage may expressly allow redemption at any time⁷. The right continues unless and until, by judgment for foreclosure⁸ or, in the case of a mortgage of land where the mortgagee is in possession, by the running of time⁹, the mortgageor's title is extinguished or his interest is destroyed by sale either under the process of the court¹⁰ or of a power in the mortgage incident to the security¹¹.

1 In the case of a legal mortgage of land by demise (see PARA 104), the term demised to the mortgagee is subject to cesser on redemption, and thus the legal estate remains in the mortgageor on redemption freed from the term demised to the mortgagee: see PARA 190. A charge by way of legal mortgage similarly ceases on redemption. In the case of an assignment of personalty by way of mortgage, the right to redeem includes the right to obtain a reassignment. In the case of a charge which is an equitable security only, redemption ends the equitable charge. As to cesser and reconveyance see PARA 642 et seq.

2 In the Law of Property Act 1925, the term 'right of redemption' is generally used (see eg Sch 1 Pt VII para 1), but 'equity of redemption' also occurs (see s 115(1)(b); and PARA 645). The two expressions have the same meaning. As to the meaning of 'right of redemption' see also PARA 109 note 2. As to the equity of redemption see note 3; and PARA 302 et seq. See also *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL.

3 *Seton v Slade, Hunter v Seton* (1802) 7 Ves 265 at 273. At common law, unless the mortgageor strictly complied as to time and place with the condition of payment, he forfeited his estate, which became the absolute property of the mortgagee: Co Litt 205a Butler's note. From early times, however, the courts of equity held that until foreclosure by order of the court the mortgageor, by applying within a reasonable time and offering to pay principal and interest and all proper costs, might redeem the estate forfeited at law: *Master and Fellows of Emanuel College, Cambridge v Evans* (1625) 1 Rep Ch 18. As the right was enforceable only in the courts of equity it was called the 'equity of redemption': see note 2.

4 See PARA 317. See also PARA 222.

5 Co Litt 205 note; *Newcomb v Bonham* (1681) 1 Vern 7; *Howard v Harris* (1683) 1 Vern 190; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL. See also PARA 317.

6 As to advances by building societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2005 et seq.

7 As to the form of a building society mortgage see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2013-2020.

8 See PARA 566 et seq.

9 See PARA 335.

10 See PARA 616 et seq.

11 See PARA 440 et seq.

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108. Importance of substance of the transaction.

The court regards the substance of the transaction, and the mortgagor is entitled to redeem¹ notwithstanding that no right to redeem is expressly reserved², or that such a right has been omitted through fraud, mistake or some unfair advantage taken by the mortgagee³. Oral evidence is admissible to show that a proviso for redemption was omitted through fraud⁴.

There are two routes by which the legal nature of the transaction can be ascertained: the external route is to show by extrinsic evidence that a written agreement is a sham intended to mask the true agreement⁵; the internal route is to ascertain from the terms of the agreement itself whether it amounts to a transaction of the legal nature the parties ascribe to it⁶. There is no one clear touchstone by which a charge may be identified: it is necessary to look at the agreement as a whole⁷.

1 As to the right to redeem generally see PARAS 107, 302 et seq.

2 *Bell v Carter* (1853) 17 Beav 11; *Chambers v Goldwin* (1801) 5 Ves 834 (on appeal (1804) 9 Ves 254); *Wicks v Scrivens* (1860) 1 John & H 215 at 218.

3 *Douglas v Culverwell* (1862) 4 De GF & J 20; *England v Codrington* (1758) 1 Eden 169; *Williams v Owen* (1840) 5 My & Cr 303 at 306; *Re Duke of Marlborough, Davis v Whitehead* [1894] 2 Ch 133; *Barton v Bank of New South Wales* (1890) 15 App Cas 379, PC; *United Dominions Trust Ltd v Beech, Savan, Tabner and Thompson* [1972] 1 Lloyd's Rep 546. The former practice was to make a mortgage by an absolute conveyance with a defeasance or clause of redemption in a separate deed which could be lost or suppressed: see *Manlove v Bale and Bruton* (1688) 2 Vern 84; *Baker v Wind* (1748) 1 Ves Sen 160; *Whitfield v Parfitt* (1851) 4 De G & Sm 240.

4 *Lincoln v Wright* (1859) 4 De G & J 16; *Walker v Walker* (1740) 2 Atk 98; *Lord Irnham v Child* (1781) 1 Bro CC 92. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 185, 192.

5 *Barton v Bank of New South Wales* (1890) 15 App Cas 379, PC; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, [1967] 1 All ER 518, CA; *Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* [1992] BCLC 609, HL; *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, [1992] BCC 270, CA.

6 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, [1992] BCC 270, CA; *Lavin v Johnson* [2002] EWCA Civ 1138, [2002] All ER (D) 501 (Jul); *Dutton v Davis* [2006] EWCA Civ 694, [2006] 2 P & CR D51, [2006] All ER (D) 56 (May); *Brighton and Hove City Council v Audus* [2009] EWHC 340 (Ch), [2009] 09 EG 192 (CS), [2009] All ER (D) 25 (Mar).

7 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, [1992] BCC 270, CA.

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109. Distinction between mortgage and sale.

If an intended arrangement is not a lending and borrowing transaction but an absolute sale, accompanied by a contemporaneous agreement for repurchase or a stipulation that the conveyance should be void upon payment of a certain sum at a fixed time, this does not entitle the vendor to such a right to redeem as is incidental to a mortgage¹, but creates a mere right of repurchase to be exercised in accordance with the terms of the power². The question is always whether the original transaction was a bona fide sale with a contract for repurchase, or a mortgage under the form of a sale³. In the former case the condition for repurchase is construed strictly against the vendor, and where there is a time limited for the purpose it must be precisely observed⁴.

The three essential differences between a mortgage or charge and a sale are that: (1) a vendor cannot recover the subject matter of the sale, whereas a mortgagor can do so by redeeming⁵; (2) a mortgagee who sells the subject matter of the mortgage must account to the mortgagor for any surplus, whereas a purchaser can retain any profit; and (3) a mortgagee can recover any outstanding balance from the mortgagors after realising the mortgage property⁶. There can, however, be a sale of book debts even though the purchaser has recourse against the vendor to recover the shortfall if the debtor fails to pay in full or even though the purchaser has to make payments to the vendor after the debts have been got in from the debtor⁷.

The transaction may be a composite one comprising a sale and mortgage to secure the unpaid price⁸.

1 See PARAS 107, 302 et seq.

2 *Williams v Owen* (1840) 5 My & Cr 303 at 306 per Lord Cottenham LC. In the Law of Property Act 1925 'right of redemption' includes an option to repurchase only if the option in effect creates a right of redemption: see s 205(1)(xvi).

3 *Williams v Owen* (1840) 5 My & Cr 303 at 306 per Lord Cottenham LC; *St John v Wareham* (1636) cited in 3 Swan at 631; *Mellor v Lees* (1742) 2 Atk 494; *Goodman v Grierson* (1813) 2 Ball & B 274; *Longuet v Scawen* (1750) 1 Ves Sen 402 at 404; *Perry v Meddowcroft* (1841) 4 Beav 197 at 203; *Gavin's Trustee v Fraser* (1920) 57 Sc LR 595, Ct of Sess; *Warnborough Ltd v Garmite Ltd* [2003] EWCA Civ 1544, [2004] 1 P & CR D18, [2003] All ER (D) 52 (Nov); *Warnborough Ltd v Garmite Ltd* [2006] EWHC 10 (Ch), [2007] 1 P & CR 34, [2006] All ER (D) 22 (Jan).

4 *Barrell v Sabine* (1684) 1 Vern 268. See also *Joy v Birch* (1836) 4 Cl & Fin 57, HL; *Pegg v Wisden* (1852) 16 Beav 239 at 244.

5 A right of redemption may be implied in a purported assignment: *Coakley v Argent Credit Corpn plc* (4 June 1998, unreported).

6 *Re George Inglefield Ltd* [1933] Ch 1, CA; *Specialist Plant Services Ltd v Braithwaite Ltd* [1987] BCLC 1, 3 BCC 119, CA; *Re Curtain Dream plc* [1990] BCLC 925, [1990] BCC 341.

7 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, [1992] BCC 270, CA.

8 *Warnborough Ltd v Garmite Ltd* [2003] EWCA Civ 1544, [2004] 1 P & CR D18, [2003] All ER (D) 52 (Nov); *Warnborough Ltd v Garmite Ltd* [2006] EWHC 10 (Ch), [2007] 1 P & CR 34, [2006] All ER (D) 22 (Jan); *Brighton and Hove City Council v Audus* [2009] EWHC 340 (Ch), [2009] 09 EG 192 (CS), [2009] All ER (D) 25 (Mar).

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110. Distinction between charge and trust.

A charge is created by the appropriation of specific property to the discharge of some debt or other obligation without there having been any change in ownership either at law or in equity¹. It confers on the chargee the right to apply to the court for an order for sale or the appointment of a receiver, but no right to forfeiture or possession². This is to be distinguished from the outright disposition of a beneficial interest in property by way of trust: the beneficiary under a trust is entitled to the trust property whereas a chargee is entitled to recourse to the subject property only to discharge the outstanding debt, and the chargor has a right to redemption³.

¹ *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155. See also PARA 106.

² *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155. As to orders for sale see PARA 616 et seq. As to the appointment of a receiver by the court see PARA 560 et seq.

³ *Re Bond Worth Ltd* [1980] Ch 228 at 248, [1979] 3 All ER 919 at 939 per Slade J; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155; *Tatung (UK) Ltd v Galax Telesure Ltd* (1989) 5 BCC 325; *Modelboard Ltd v Outer Box Ltd* [1993] BCLC 623, [1992] BCC 945. See also *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602, [1991] BCC 484.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/111. Distinction between mortgage and statutory charge.

111. Distinction between mortgage and statutory charge.

Statutory charges differ from mortgages in that mortgages arise out of agreement between the parties. The nature, effect and means of realisation of a statutory charge depend on the terms of the statute in question¹. The following are instances of statutory charges: charging orders in favour of tenants or landlords of agricultural holdings in respect of compensation payable²; charges in favour of landlords of business premises in respect of compensation for or the cost of improvements³; charging orders on land by way of execution⁴; charges upon premises of frontagers in favour of local authorities for expenses incurred in making up private streets⁵; charges in favour of local authorities in respect of expense of executing works to housing and related administrative expenses⁶; charges to secure the repayment of discounts given to public sector tenants on the purchase of a house or flat in the event of early disposal⁷; charges on land in favour of landowners executing certain improvements⁸; charges on the property of mental patients⁹; orders charging a judgment debtor's share or interest in a partnership¹⁰; charges on property recovered or preserved for the benefit of legally assisted persons in respect of contributions due from them to the Legal Services Commission in respect of services funded by the Commission as part of the Community Legal Service¹¹; and orders charging solicitors' costs on property recovered through their instrumentality¹².

¹ See eg the Housing Act 2004 ss 37, 50; **HOUSING** vol 22 (2006 Reissue) PARAS 405, 413. See also the Charging Orders Act 1979 s 1(5); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1470.

² See the Agricultural Holdings Act 1986 ss 85-87; and **AGRICULTURAL LAND** vol 1 (2008) PARA 477 et seq.

³ See the Landlord and Tenant Act 1927 s 12, Sch 1; and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 801.

⁴ As to charging orders see the Charging Orders Act 1979; PARA 291; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1467 et seq.

- 5 See the Highways Act 1980 s 212; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 159.
- 6 See the Housing Act 2004 ss 49, 50; and **HOUSING** vol 22 (2006 Reissue) PARAS 412, 413.
- 7 See the Housing Act 1985 ss 36, 156; the Housing Act 1988 s 79, Sch 11 paras 1, 2; the Housing Act 1996 ss 11, 11B; and **HOUSING** vol 22 (2006 Reissue) PARA 108.
- 8 See the Agricultural Holdings Act 1986 s 86; and **AGRICULTURAL LAND** vol 1 (2008) PARA 477 et seq.
- 9 See the Mental Capacity Act 2005 s 18; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 759.
- 10 See the Partnership Act 1890 s 23(2), (3); and **PARTNERSHIP** vol 79 (2008) PARA 95 et seq.
- 11 See the Access to Justice Act 1999 s 10(7); and **LEGAL AID** vol 65 (2008) PARA 97. Sums due to the Commission in respect of services funded as part of the Criminal Defence Service are similarly recoverable: see s 17(3)(g); the Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001, SI 2001/856; and **LEGAL AID** vol 65 (2008) PARA 174 et seq.
- 12 See the Solicitors Act 1974 s 73; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 1011 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/112. Mortgage distinguished from pledge or pawn.

112. Mortgage distinguished from pledge or pawn.

A pledge is a species of bailment whereby chattels are deposited by way of security with the pledgee, its key characteristic being the actual or constructive delivery¹ of immediate possession of the chattels in exchange for the loan but without transfer of ownership². The pledgor's right to possession is deferred to the repayment of the debt; however, he retains the right to deal with the goods as title-holder subject to the pledge³. It is said that the pledgor retains a general property in the goods, while the pledgee takes a special property⁴, but this terminology has been criticised⁵. The pledgee does not acquire title to the goods⁶, but has the power to sell the goods in default of payment at the stipulated time, if any, or at a reasonable time after demand and non-payment where no time for payment is agreed upon⁷.

A mortgage of chattels, on the other hand, is an assignment of a legal or equitable interest⁸. It does not depend on the delivery of possession to the mortgagee⁹. Pledge and pawn are theoretically interchangeable terms, but the latter has particularly come to mean a small advance to a borrower on a pledge of personal goods such as jewellery: depending on the size of the advance such an agreement may be a regulated consumer credit agreement¹⁰, and so governed by statutory provisions¹¹. There is an automatic statutory forfeiture to a pawnbroker in respect of certain small unredeemed pawns¹²; otherwise, the right of foreclosure is never available to a pledgee as it is to a mortgagee. On the sale of the pledged property the pledgee holds any sum in excess of the debt on trust for the pledgor and is liable in equity to pay interest on the retained proceeds¹³.

A deposit of share certificates to secure a debt, or as cover, whether accompanied¹⁴ or unaccompanied¹⁵ by a transfer in blank as to the name of the transferee¹⁶, amounts to an equitable mortgage and not a pledge¹⁷; a fortiori where the legal estate in the shares is transferred to the lender the transaction is a mortgage¹⁸. If a transfer is required to be by deed, a transfer in blank, although subsequently completed, is not a complete security, but only evidence of an agreement to transfer, giving the transferee an equitable title¹⁹. A security given by the deposit of bearer securities has on the other hand been treated as a pledge²⁰.

1 *Martin v Reid* (1862) 11 CBNS 730. The deposit of share certificates is not regarded as a pledge, but as a charge: see the text to note 17.

- 2 *Coggs v Bernard* (1703) 2 Ld Raym 909; 1 Smith LC (13th Edn) 175; *Mills v Charlesworth* (1890) 25 QBD 421 at 424, CA (revsd on the facts sub nom *Charlesworth v Mills* [1892] AC 231, HL); *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508, [1997] 4 All ER 115 at 126, CA, per Millett LJ. As to pledges and pawns see further **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 1 et seq.
- 3 *Franklin v Neate* (1844) 13 M & W 481; *Halliday v Holgate* (1868) LR 3 Exch 299 at 302, Ex Ch.
- 4 *Ryall v Rowles* (1750) 1 Ves Sen 348 per Burnet J; *Jones v Smith* (1794) 2 Ves 372; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 232, CA, per Cotton LJ, and at 234 per Fry LJ; *George Attenborough & Son v Solomon* [1913] AC 76 at 84, HL, per Lord Haldane LC; *Fraser v Byas* (1895) 11 TLR 481; and see *Sir John Ratcliff v Davis* (1610) 1 Bulst 29 per Fleming CJ; and **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 22.
- 5 In *The Odessa* [1916] 1 AC 145 at 158-159, PC, Lord Mersey preferred the term 'special interest' on the ground that when the pawnee's right to sell is examined, the so-called 'special property' which that right is said to create is in truth no property at all. See also *Mathew v TM Sutton Ltd* [1994] 4 All ER 793 at 800, [1994] 1 WLR 1455 at 1461 per Chadwick J; and **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 22.
- 6 *Carter v Wake* (1877) 4 ChD 605 at 606.
- 7 *Burdick v Sewell* (1883) 10 QBD 363 at 366-367; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 232, CA.
- 8 *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508, [1997] 4 All ER 115 at 126, CA, per Millett LJ.
- 9 *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508, [1997] 4 All ER 115 at 126, CA, per Millett LJ; *Maugham v Sharpe* (1864) 17 CBNS 443.
- 10 See the Consumer Credit Act 1974 s 8(3); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79 et seq.
- 11 See the Consumer Credit Act 1974 ss 114-121; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 208 et seq.
- 12 See the Consumer Credit Act 1974 s 120(1)(a); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 212, 215.
- 13 *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455.
- 14 *Stubbs v Slater* [1910] 1 Ch 632 at 639, CA; *London and Midland Bank v Mitchell* [1899] 2 Ch 161; *France v Clark* (1884) 26 ChD 257 at 262, CA, per Lord Selborne LC; cf *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA.
- 15 *Harrold v Plenty* [1901] 2 Ch 314; *Re Davies, ex p Moss* (1849) 3 De G & Sm 599; *Re Shelley, ex p Stewart* (1864) 4 De G J & Sm 543; *Re Harrison and Ingram, ex p Whinney* [1905] WN 143.
- 16 See *Fry and Mason v Smellie and Taylor* [1912] 3 KB 282, CA; *Colonial Bank v Cady and Williams, London Chartered Bank of Australia v Cady and Williams* (1890) 15 App Cas 267, HL. See also PARA 237.
- 17 In some cases in which the distinction between a mortgage and a pledge was not material to the decision the word 'pledge' has been used as applicable to a security by deposit of certificates of shares: see *Ellis & Co's Trustee v Dixon-Johnson* [1925] AC 489 at 493, HL, per Lord Sumner; *Halliday v Holgate* (1868) LR 3 Exch 299, Ex Ch; *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273 at 279-281 (where Jessel MR also uses the word 'mortgagee' in relation to the same transaction); *Colonial Bank v Cady and Williams, London Chartered Bank of Australia v Cady and Williams* (1890) 15 App Cas 267, HL.
- 18 *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA; *General Credit and Discount Co v Glegg* (1883) 22 ChD 549.
- 19 *Powell v London and Provincial Bank* [1893] 2 Ch 555, CA; *France v Clark* (1884) 26 ChD 257, CA. See also PARA 237.
- 20 *Gorgier v Mieville* (1824) 3 B & C 45; *Donald v Suckling* (1866) LR 1 QB 585; *Carter v Wake* (1877) 4 ChD 605, doubted in *Harrold v Plenty* [1901] 2 Ch 314 at 316 per Cozens-Hardy J and in *Sadler v Worley* [1894] 2 Ch 170 at 175 per Kekewich J. See also *Stubbs v Slater* [1910] 1 Ch 632, CA; and PARA 568 note 4.

113. Mortgage distinguished from lien.

A mortgage differs from a possessory lien at common law, for the lien is only a personal right to retain possession of another person's goods previously delivered for some other purpose until a debt is paid; the lien cannot generally be assigned and continues only so long as the possessor of the right holds the goods¹. A possessory lien may be accompanied by a contractual power of sale without becoming a charge². A mortgage differs also from the right of lien given by or under statute in the case of shipowners³ and in other like cases, the remedy in each case being controlled by the terms of the relevant enactment. The implied right of the mortgagee under an equitable mortgage created by the deposit of title deeds to retain the deeds is not a separate legal or common law lien⁴.

An unpaid vendor's lien arises in equity on exchange of contracts for the sale of land⁵. The vendor has an equitable lien on the property for the purchase money which he retains notwithstanding an outright conveyance of the legal estate, a receipt for the purchase money and delivery of the deeds if any part of the purchase price remains unpaid⁶. It is excluded where its retention would be inconsistent with the provisions of the contract for sale, or with the true nature of the transaction⁷.

An equitable charge differs from an equitable lien in that the former arises from contract whereas the latter arises by operation of law⁸. However, equitable liens are similar to equitable charges in that they create a proprietary interest, are enforceable by judicial order for sale, and are registrable⁹.

1 *Legg v Evans* (1840) 6 M & W 36 at 41; and see **LIEN** vol 68 (2008) PARA 810 et seq. As to equitable charges see PARA 106.

2 *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109, HL; *Re Hamlet International plc (in administration), Trident International Ltd v Barlow* [1999] 2 BCLC 506, CA.

3 As to maritime lien see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1014 et seq; and as to statutory lien see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1023.

4 *Re Molton Finance Ltd* [1968] Ch 325, [1967] 3 All ER 843, CA; and see PARA 121. It is not possible to create an equitable mortgage by the deposit of title deeds alone: see PARA 118.

5 See *Barclays Bank plc v Estates and Commercial Ltd* [1997] 1 WLR 415, 74 P & CR 30, CA; and **LIEN** vol 68 (2008) PARAS 859-860.

6 See note 5.

7 See note 5.

8 See **LIEN** vol 68 (2008) PARA 814.

9 See **LIEN** vol 68 (2008) PARA 855 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/114. Avoidance of mortgage.

114. Avoidance of mortgage.

A mortgage may be void or voidable in certain circumstances on the ground of mistake¹, non est factum², misrepresentation³, duress⁴ or undue influence⁵, or if it does not comply with the necessary formalities⁶, or because it constitutes a fraud against the mortgagor's general

creditors⁷ or an unconscionable bargain⁸, or if it is given for an illegal consideration or is opposed to public policy⁹. Where part of the consideration is illegal, the security is only avoided to that extent¹⁰. Where a mortgagor gives security for the debts of another, the mortgage may be voidable even though the mortgagee has committed no wrong against the mortgagor, if the mortgagee has actual or constructive notice of a wrong committed by the borrower against the mortgagor¹¹. A void or voidable mortgage may nonetheless constitute an equitable mortgage¹² or an equitable charge¹³ and the mortgagee may have other remedies¹⁴.

1 As to the effect of mistake in negating or nullifying consent to a transaction see generally **MISTAKE** vol 77 (2010) PARA 1 et seq. As to the right of a person who has executed a deed or other document under a misapprehension as to its essential nature to deny the validity of the execution see **CONTRACT** vol 9(1) (Reissue) PARA 707; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 67 et seq.

2 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 69-73.

3 For the circumstances in which misrepresentation renders a contract voidable see generally **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 783.

4 See **CONTRACT** vol 9(1) (Reissue) PARAS 710-711; **EQUITY** vol 16(2) (Reissue) PARA 436.

5 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. See also **CONTRACT** vol 9(1) (Reissue) PARA 712 et seq; **EQUITY** vol 16(2) (Reissue) PARA 417 et seq; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 839 et seq.

6 As to the formalities for a legal mortgage of land see PARA 104. As to legal mortgages see also PARA 117.

7 As to the avoidance of dispositions in fraud of creditors see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 663 et seq. See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 836; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq.

8 See *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 151, [1997] 2 FCR 1 at 7-8, CA, per Nourse LJ; *Kalsep Ltd v X-Flow BV* [2001] All ER (D) 113 (Mar). See also **EQUITY** vol 16(2) (Reissue) PARA 429; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 854.

9 As to void and illegal contracts see generally **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq. As to the avoidance of securities given in respect of illegal transactions see **CONTRACT** vol 9(1) (Reissue) PARAS 878-879; and see eg **LICENSING AND GAMBLING** vol 67 (2008) PARA 361 (securities given for gaming considerations).

10 *Sheehy v Sheehy* [1901] 1 IR 239; and see *Spector v Ageda* [1973] Ch 30, [1971] 3 All ER 417.

11 See PARAS 147-153.

12 See PARA 240. See also PARA 194.

13 See PARAS 194, 241.

14 See PARA 153.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/115. Consumer credit legislation.

115. Consumer credit legislation.

The Consumer Credit Act 1974 establishes a code for the regulation of the provision to individuals of credit¹. The Act provides for the making of regulations as to the form and content of regulated agreements² and deals with, amongst other things, the cancellation³, termination⁴ and enforcement⁵ of, and withdrawal from⁶, such agreements. With particular reference to mortgages, the Act contains provisions dealing with the form and content of certain securities provided in relation to a regulated agreement⁷ and the enforcement of such securities⁸. In

addition, the Act empowers the court to make orders as to credit agreements if it determines that the relationship between the creditor and the debtor arising out of the agreement is unfair to the debtor⁹.

1 See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79 et seq.

2 See the Consumer Credit Act 1974 s 60; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 161. As to the meaning of 'regulated agreement' see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79.

3 See the Consumer Credit Act 1974 ss 67-73; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 183 et seq.

4 See the Consumer Credit Act 1974 Pt VII (ss 86A-104); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 251 et seq.

5 See the Consumer Credit Act 1974 Pt IX (ss 127-144); and **CONSUMER CREDIT**.

6 See the Consumer Credit Act 1974 ss 57-58; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 181-182.

7 See the Consumer Credit Act 1974 s 105; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 200.

8 See the Consumer Credit Act 1974 ss 126, 127; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 220, 290.

9 See the Consumer Credit Act 1974 ss 140A-140D; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 269-270.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(1) IN GENERAL/116. Taxation.

116. Taxation.

Taxation provisions as they may affect mortgages are dealt with elsewhere in this work¹.

1 See **CAPITAL GAINS TAXATION; INCOME TAXATION; INHERITANCE TAXATION**. See also **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(2) LEGAL AND EQUITABLE MORTGAGES/(i) Legal Mortgages/117. Legal mortgages.

(2) LEGAL AND EQUITABLE MORTGAGES

(i) Legal Mortgages

117. Legal mortgages.

A legal mortgage of unregistered land¹ can be created only by demise, sub-demise or legal charge². A legal mortgage of registered land can be made only by a charge by deed expressed to be by way of legal mortgage or by charging the estate with the payment of money, and not by demise³.

Since, by making a pledge or mortgage of his property, the owner does not cease to be the owner of the property any further than is necessary to give effect to the security he has thus created⁴, he can mortgage the property again. The mortgagor of a legal estate in land retains his legal estate⁵, and can create further mortgages by demise or charge⁶. A subsequent

mortgage is, as between mortgagor and mortgagee, a complete security on the mortgagor's interest, saving only the rights of prior incumbrancers⁷; and, on redemption of the prior mortgage, no reconveyance is required, since a mortgage term ceases on payment off of the mortgage⁸. A subsequent mortgagee who pays off the first mortgagee may, however, call for a transfer of the first mortgage, and where there are successive mortgagees they may according to their priority exercise the right of paying off the first mortgage and taking a transfer⁹.

A legal mortgage of personal chattels may be made either by pledge or, subject to certain exceptions, by bill of sale¹⁰. A legal mortgage of a debt or other legal chose or thing in action may be made by written assignment complying with the statutory provisions as to the assignment of such choses in action¹¹.

1 As to the meaning of 'land' in the Law of Property Act 1925 see PARA 104 note 2.

2 See the Law of Property Act 1925 s 205(1)(xvi); and PARA 104 note 1. As to creation of legal mortgages see PARA 187 et seq.

3 See the Land Registration Act 2002 ss 23(1), 25; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906 et seq.

4 *Bradford Banking Co Ltd v Briggs, Son & Co Ltd* (1886) 12 App Cas 29 at 36, HL, per Lord Blackburn. See also PARA 302.

5 Formerly, a first legal mortgage of freehold land was by conveyance (see PARA 187), so that any subsequent mortgage was equitable only, being a mortgage of the mortgagor's equity of redemption. A subsequent mortgage was formerly called a puisne mortgage, but that term now means a legal mortgage not protected by deposit of documents: see the Land Charges Act 1972 s 2(1), (4)(i); and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628-629.

6 As to the priority of mortgages see PARA 258 et seq.

7 See *Frazer v Jones* (1846) 5 Hare 475 at 481.

8 See the Law of Property Act 1925 s 116; and PARA 642.

9 See the Law of Property Act 1925 s 95(1), (2); and PARA 364.

10 See PARA 231.

11 See the Law of Property Act 1925 s 136(1); and **CHOSSES IN ACTION** vol 13 (2009) PARAS 72, 80-85. Section 136(1) validates only absolute assignments not purporting to be by way of charge only, but a mortgage in ordinary form which transfers the property with a proviso for redemption and reconveyance is such an absolute assignment: see s 136(1); and **CHOSSES IN ACTION** vol 13 (2009) PARA 76.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(2) LEGAL AND EQUITABLE MORTGAGES/(ii) Equitable Mortgages of Land/A. EQUITABLE MORTGAGES SINCE 1989/118. Necessity for writing.

(ii) Equitable Mortgages of Land

A. EQUITABLE MORTGAGES SINCE 1989

118. Necessity for writing.

An equitable mortgage is a specifically enforceable contract to create a legal mortgage¹. A contract made since 27 September 1989² for a mortgage of or charge on land or any interest in land can be made only in writing and by incorporating all the terms which the parties have expressly agreed³ in one document or, where contracts are exchanged, in each⁴. The document

incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract⁵. The same requirements apply to a variation of a material term of such a contract⁶ but not to a collateral contract which is not itself a contract for the disposition of an interest in land⁷. Accordingly, a facility letter⁸ or mortgage deed signed by one party cannot create a valid equitable mortgage⁹. Since 27 September 1989 the mere deposit of title deeds by way of security can no longer create a valid equitable mortgage¹⁰.

1 *Swiss Bank Corp'n v Lloyds Bank Ltd* [1982] AC 584, [1980] 2 All ER 419, CA; affd [1982] AC 584, [1981] 2 All ER 449, HL.

2 The date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (see the text to notes 4-5) came into force: see ss 2(7), 5(3), (4). As to the position before that date see PARA 119 et seq.

3 An agreement reached in correspondence is not sufficient: see *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA. As to the terms of equitable mortgages in writing see also PARAS 133-136.

4 Law of Property (Miscellaneous Provisions) Act 1989 s 2(1), (6) (s 2(6) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). The terms may be incorporated in a document either by being set out in it or by reference to some other documents: Law of Property (Miscellaneous Provisions) Act 1989 s 2(2). As to incorporation by reference to some other document see *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA.

5 Law of Property (Miscellaneous Provisions) Act 1989 s 2(3). A typed name is not a signature: see *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA.

6 *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, [1997] 1 WLR 38, CA.

7 *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853.

8 *Lloyds Bank v Bryant* [1996] NPC 31, CA.

9 A unilateral contract can constitute an agreement to dispose of an interest in land: see *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557, CA.

10 *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA. As to the creation of a mortgage by deposit of deeds before 27 September 1989 see PARA 119 et seq.

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B. EQUITABLE MORTGAGES BEFORE 1989

119. Equitable mortgage by deposit of deeds.

Until 27 September 1989¹ a good security in equity could be created by the deposit of the title deeds of freehold or freehold or leasehold property². The deposit could be to secure the debt of a third person³. A deposit of title deeds was regarded as an imperfect mortgage which the mortgagee was entitled to have perfected, or as a contract for a legal mortgage which gave to the party entitled all such rights as he would have had if the contract had been completed⁴. By the deposit the mortgagor contracted that his interest in the property comprised in the deeds was to be liable to the debt and bound himself to do everything necessary to effect the vesting in the mortgagee of such interest as a mortgage should create⁵. Where, however, a deposit was made with a surety by way of indemnity, the surety was not, in the absence of agreement, entitled to call for a legal mortgage⁶.

1 le the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 2 came into force: see ss 2(7), 5(3), (4); and PARA 118.

2 *Russel v Russel* (1783) 1 Bro CC 269. As to the position where the mortgage is of land abroad see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 406.

3 *Re Wallis & Simmonds (Builders) Ltd* [1974] QB 94, [1974] 1 All ER 561.

4 *Parker v Housefield* (1834) 2 My & K 419; *Carter v Wake* (1877) 4 ChD 605; *Harrold v Plenty* [1901] 2 Ch 314; *Ex p Wright* (1812) 19 Ves 255 at 258; *Pryce v Bury* (1853) 2 Drew 41; *Featherstone v Fenwick* (1784) 1 Bro CC 270n.

5 *Pryce v Bury* (1853) 2 Drew 41 at 42 per Kindersley V-C; *National Provincial Bank of England v Games* (1886) 31 ChD 582 at 587, CA, per Pearson J. Under the Law of Property Act 1925, the interest created by the mortgage was a term of years: see PARA 187.

6 *Sporle v Whayman* (1855) 20 Beav 607. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1147.

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120. Form of deposit.

In an equitable mortgage by deposit of deeds the deposit could be of the deeds alone¹, or might be accompanied by a memorandum of the terms of the deposit² or by an agreement to give a mortgage³. The proprietor of any registered land or charge might create a lien on the land by deposit of the land certificate or charge certificate⁴. One joint tenant could not deposit the title deeds without the consent of the other⁵. An equitable charge secured by deposit of documents relating to the legal estate of unregistered land did not need to be registered as a land charge⁶. A deposit, without writing, or by word of mouth, might create a charge upon the property notwithstanding the statutory provision requiring a contract for the disposition of land to be evidenced in writing⁷, since the delivery of the deeds was sufficient part performance of the implied agreement to give a security⁸. The charge created by the deposit was contractual, for, although it arose by presumption, it did not arise by operation of law⁹. Where the deposit was accompanied by a written document, the document must be referred to in order to ascertain the exact nature of the charge¹⁰; and oral evidence is not admitted to contradict the writing¹¹, although oral evidence of a subsequent oral agreement may be given¹².

1 *Russel v Russel* (1783) 1 Bro CC 269; *Re Knight, ex p Langston* (1810) 17 Ves 227. Cf *Ex p Warner* (1812) 19 Ves 202; *Whitbread v Jordan* (1835) 1 Y & C Ex 303 (cases of deposit of copy of court roll). An equitable charge can no longer be created by deposit alone: see note 7; and PARA 118.

2 *Ex p Kensington* (1813) 2 Ves & B 79. As to the distinction between a mere memorandum of deposit and a memorandum constituting a security see *Hari Sankar Paul v Kedar Nath Saha* [1939] 2 All ER 737, PC; *Re White Rose Cottage* [1965] Ch 940, [1965] 1 All ER 11, CA.

3 *Lister v Turner* (1846) 5 Hare 281; *National Provincial Bank of England v Games* (1886) 31 ChD 582, CA.

4 See the Land Registration Act 1925 s 66 (repealed with savings by the Land Registration Act 2002 ss 134, 135, Schs 12, 13). Such a lien is in the nature of a mortgage or charge rather than a true lien: see PARA 113.

5 *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA.

6 See the Land Charges Act 1972 s 2(4)(iii); and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628-632. See also the Law of Property Act 1925 s 13; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 247. As to the priority of

mortgages see generally PARA 258 et seq. As to the mortgages and charges which are registrable as land charges see PARA 260.

7 See the Law of Property Act 1925 s 40 (replacing in part the Statute of Frauds (1677)) (repealed by the Law of Property (Miscellaneous Provisions) Act 1989 ss 2(8), 4, Sch 2, except in relation to contracts made before 27 September 1989); and PARA 132. See also PARA 122. Since 27 September 1989 contracts must be in writing, not merely evidenced in writing: see PARA 118.

8 *Burgess v Moxon* (1856) 2 Jur NS 1059; *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 282, PC. See also **EQUITY** vol 16(2) (Reissue) PARA 754 et seq.

9 *Re Wallis & Simmonds (Builders) Ltd* [1974] QB 94, [1974] 1 All ER 561.

10 *Shaw v Foster* (1872) LR 5 HL 321 at 340; *Wylde v Radford* (1863) 33 LJCh 51; *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA.

11 *Ex p Coombe* (1810) 17 Ves 369.

12 *Ede v Knowles* (1843) 2 Y & C Ch Cas 172.

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121. Equitable mortgage by deposit and lien mutually exclusive.

Where an equitable mortgage or charge was created by deposit of title deeds¹, there was an implied contract that the mortgagee or chargee might retain the deeds until he was paid². When the mortgage or charge was avoided, for example for non-registration as a land charge³, then everything ancillary to it was avoided, including the right of retention⁴.

1 See PARAS 119-120.

2 As to the distinction between mortgages and liens see PARA 113.

3 As to the registration of land charges see generally **LAND CHARGES** vol 26 (2004 Reissue) PARA 601 et seq.

4 *Re Molton Finance Ltd* [1968] Ch 325 at 332-333, [1967] 3 All ER 843 at 845, CA, per Lord Denning MR. See also *Re Wallis & Simmonds (Builders) Ltd* [1974] QB 94, [1974] 1 All ER 561.

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122. Memorandum without deposit.

A memorandum¹ or agreement in writing showing an intention to deposit title deeds by way of mortgage or to charge the property comprised in the deeds was sufficient even if no deeds were in fact deposited², and even if some of the deeds were not executed³. A written direction or consent that the deeds might be retained as a security was equally effective⁴.

A mere oral agreement to deposit which was not acted upon⁵ was not sufficient, but an oral agreement to mortgage with a subsequent delivery of the deeds was, and the security related back to the time of the agreement⁶.

A mere promise to give security on deeds to a person who already held them did not of itself create an equitable charge⁷.

1 As to the memorandum see further PARA 132.

2 *Re Carter and Justins, ex p Sheffield Union Banking Co* (1865) 13 LT 477; *Re Leathes, ex p Leathes* (1833) 3 Deac & Ch 112; *Re Daintry and Ryle, Re Ravenscroft, ex p Arkwright* (1843) 3 Mont D & De G 129; *Re Blew, ex p Jones* (1835) 4 Deac & Ch 750.

3 *Re Pye, ex p Orrett* (1837) 3 Mont & A 153, where the agreement was to deposit a lease when granted.

4 *Fenwick v Potts* (1856) 8 De GM & G 506.

5 *Re Beavan, ex p Coombe* (1819) 4 Madd 249; *Re Collins, ex p Perry* (1843) 3 Mont D & De G 252; *Re Ridge, ex p Halifax* (1842) 2 Mont D & De G 544.

6 *Edge v Worthington* (1786) 1 Cox Eq Cas 211.

7 *Re Beetham, ex p Broderick* (1887) 18 QBD 766, CA.

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123. Deposit of part of deeds.

To create a valid mortgage by deposit of title deeds¹ it was not necessary that the whole or even the most material of the deeds should be deposited, or that the deeds deposited should show a complete or good title in the depositor: it was sufficient if the deeds deposited bona fide related to the property or were material evidence of title, and were shown to have been deposited with the intention of creating a charge². All the deeds deposited were included in the security, even if the accompanying memorandum only specified some of those deeds³.

An equitable mortgage could be created by the deposit of a receipt for purchase money containing the terms of the agreement for purchase and attached to a plan⁴, or an agreement for a lease⁵, even if the lease was afterwards granted on different terms⁶, but not, it seems, by a deposit of an attested copy of a lease⁷.

1 See PARAS 119-120.

2 *Ex p Wetherell* (1805) 11 Ves 398; *Lacon v Allen* (1856) 3 Drew 579; *Roberts v Croft* (1857) 24 Beav 223; *Re Roche's Estate* (1890) 25 LR Ir 58 (on appeal 25 LR Ir 284, Ir CA). In *Roberts v Croft*, a solicitor made a deposit of the title deeds of his estate with a client, but omitting the conveyance to himself; he afterwards deposited the conveyance with his bank, and it was held that the deposit of the earlier deeds constituted a good equitable mortgage and gave the client priority over the bank. See also *Re Price, ex p Pearse and Prothero* (1820) Buck 525.

3 *Ferris v Mullins* (1854) 2 Sm & G 378. As to a mortgage of shares in a limited company created by deposit of certificates see *Harrold v Plenty* [1901] 2 Ch 314. As to the memorandum see further PARA 132.

4 *Goodwin v Waghorn* (1835) 4 LJCh 172. See also *Simmons v Montague* [1909] 1 IR 87, where the deposit of a plan of the property was held sufficient.

5 *Unity Joint-Stock Mutual Banking Association v King* (1858) 25 Beav 72; *Union Bank of London v Kent* (1888) 39 ChD 238, CA; *Tebb v Hodge* (1869) LR 5 CP 73.

6 *Re Buckland, ex p Reid* (1848) De G 600.

7 *Re Borrow, ex p Broadbent* (1834) 1 Mont & A 635.

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124. Extent of mortgagee's duty to examine deeds.

It was not negligence to accept the owner's statement that the deeds deposited were all that were necessary. If the court was satisfied of the good faith of the person who had a prior equitable charge, and was satisfied that there had been a positive statement, honestly believed, that he had the necessary deeds, then he was not bound to examine the deeds, nor was he bound by constructive notice of their actual contents or of any deficiencies which by examination he might have discovered in them¹.

1 *Dixon v Muckleston* (1872) 8 Ch App 155 at 161 per Lord Selborne LC. See also PARA 282.

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125. Effect of mere deposit.

A deposit of title deeds did not in itself create a charge, and the mere possession of deeds without evidence of the contract under which possession was obtained, or of the manner in which the possession originated so that a contract might be inferred¹, did not create an equitable security². The deposit was a fact which admitted evidence of an intention to create a charge which would otherwise be inadmissible, and raised a presumption of a charge which threw upon the debtor the burden of rebutting it³.

A mere deposit of title deeds upon an advance, with intent to create a security on them, but without a word passing, gave an equitable lien so that, as between debtor and creditor, the fact of possession of the title deeds raised the presumption that they were deposited by way of security⁴. As against strangers, however, this was only the case where possession could be accounted for in no other way⁵, and the mere fact that the title deeds were produced from the custody of a creditor many years after the deposit, without explanation, did not in itself support a claim of a mortgage by deposit⁶. There had to be proof of the time when both the loan and deposit were made⁷.

1 *Re McMahon, McMahon v McMahon* (1886) 55 LT 763.

2 *Dixon v Muckleston* (1872) 8 Ch App 155; *Chapman v Chapman* (1851) 13 Beav 308; *Wardle v Oakley* (1864) 36 Beav 27. See also *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA.

3 *Russel v Russel* (1783) 1 Bro CC 269; *Burgess v Moxon* (1856) 2 Jur NS 1059.

4 *Re Knight, ex p Langston* (1810) 17 Ves 227 at 230; *Ex p Mountfort* (1808) 14 Ves 606; *Maugham v Ridley* (1863) 8 LT 309.

5 *Bozon v Williams* (1829) 3 Y & J 150 at 161.

6 *Chapman v Chapman* (1851) 13 Beav 308.

7 *Kebell v Philpott, Kebell v Daniel* (1838) 7 LJCh 237.

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126. Deposit by mistake.

The delivery by mistake of deeds to a creditor did not constitute him an equitable mortgagee, although the delivery might be prima facie evidence of an intention which threw the burden of proving the negative on the owner¹. A deposit of deeds could not create an equitable mortgage on property to which the deeds did not relate, notwithstanding that by a misapprehension the creditor believed that they related to that property².

Where deeds were delivered for a special purpose other than putting them in pledge, the further purpose of creating a security could not be inferred. Thus where they were delivered merely for the purpose of enabling a solicitor to prepare a legal mortgage, an equitable mortgage by deposit was not created³ unless there was an immediate intention to give a security by the deposit, notwithstanding that a formal legal security was also in contemplation⁴. If, before the money was advanced, the deeds were deposited with a view to preparing a future mortgage, the deposit was not considered as an equitable mortgage by deposit; but it was otherwise where there was an advance and the deeds were deposited under a promise to forbear suing, even though they might be deposited only for the purpose of preparing a future mortgage, and in such a case the deeds were given as part of the security⁵.

1 *Wardle v Oakley* (1864) 36 Beav 27 at 30, where the deeds of leaseholds were sent by mistake with the deeds of freeholds which had been mortgaged by deed, and the possession of the former deeds was held to create no lien on the leasehold property.

2 *Jones v Williams* (1857) 24 Beav 47.

3 *Norris v Wilkinson* (1806) 12 Ves 192; *Lloyd v Attwood, Attwood v Lloyd* (1859) 3 De G & J 614 at 651.

4 *Edge v Worthington* (1786) 1 Cox Eq Cas 211; *Ex p Bruce* (1813) 1 Rose 374; *Ex p Wright* (1812) 19 Ves 255 at 258; *Hockley v Bantock* (1826) 1 Russ 141.

5 *Keys v Williams* (1838) 3 Y & C Ex 55 at 61 per Lord Abinger CB.

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127. Extent of security created.

Where the deposit of deeds was made for the purpose of obtaining credit, it did not cover money previously advanced and still due¹, unless an intention to cover it appeared from the circumstances². A deposit did, however, cover subsequent advances upon oral evidence of an agreement that the security should be so extended, and notwithstanding that the original deposit was accompanied by a memorandum in writing limiting the purpose of the deposit³; but it did not extend to an advance by a third person unless connected with some dealing with the estate⁴, or to a subsequent advance made after a legal mortgage had been taken⁵.

- 1 *Mountford v Scott* (1823) Turn & R 274.
- 2 *Re New, ex p Farley, Lavender and Owen* (1841) 1 Mont D & De G 683.
- 3 *Re Knight, ex p Langston* (1810) 17 Ves 227; *Ex p Kensington* (1813) 2 Ves & B 79; *Re Burkill, ex p Nettleship* (1841) 2 Mont D & De G 124; *James v Rice* (1854) 5 De GM & G 461.
- 4 *Ex p Whitbread* (1812) 19 Ves 209.
- 5 *Re Hewett and Hopkins, ex p Hooper* (1815) 19 Ves 477.

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128. With whom the deeds must be deposited.

When the deposit of title deeds was made without a memorandum, the delivery had to be made to the creditor or his agent, being some person other than the debtor. So a memorandum appropriating as security to a creditor a policy which remained in the debtor's possession was not sufficient of itself to create a charge on it¹. A deposit with the debtor's wife was not sufficient². A deposit with the debtor's solicitor was, however, sufficient, as he was thereby constituted agent and trustee for the creditor³; and, in mortgaging, a solicitor might make a deposit by placing his own deeds in a box containing the papers of his client the mortgagee⁴.

- 1 *Adams v Claxton* (1801) 6 Ves 226 at 230. See, however, *Middleton v Pollock, ex p Elliott* (1876) 2 ChD 104, where a memorandum by a solicitor declaring himself trustee for a client of leaseholds of which he was mortgagee was held valid even though the fact of the execution of the memorandum was not known to the client.
- 2 *Ex p Coming* (1803) 9 Ves 115.
- 3 *Lloyd v Attwood, Attwood v Lloyd* (1859) 3 De G & J 614 at 652.
- 4 *Mason v Morley (No 2)* (1865) 34 Beav 475. As to the relation of solicitor and client see generally **LEGAL PROFESSIONS** vol 66 (2009) PARA 763 et seq.

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129. Extent of property charged.

The charge created by a deposit of the deeds included all the property comprised in the deeds¹, and extended to every estate and interest in the property possessed by the depositor at the time of the deposit, every interest which he afterward acquired² and all incidental rights, such as the goodwill of a business carried on upon the premises³. Apart from statutory power, a limited owner⁴ could charge only his own equitable interest by a deposit, but oral evidence of the remainderman's consent was admissible to charge the legal estate⁵.

- 1 *Ashton v Dalton* (1846) 2 Coll 565.

2 *Re Baker, ex p Bisdee* (1840) 1 Mont D & De G 333; *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 282, PC; *Re Roche's Estate* (1890) 25 LR Ir 58 (on appeal 25 LR Ir 284, Ir CA).

3 *Chissum v Dewes* (1828) 5 Russ 29.

4 As to limited owners see PARA 167 et seq.

5 *Williams v Medlicot* (1819) 6 Price 495.

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130. Parting with or loss of deeds.

The creditor with whom deeds were deposited did not lose his lien by parting with the deeds for the purpose of allowing a sale to be effected¹, or, if the debtor was the creditor's solicitor and the deeds were in his custody as the creditor's agent, by the debtor wrongfully removing them from the creditor's deed box². Where neither the deeds nor any memorandum of deposit could be produced, secondary evidence of the deposit could be given upon proof that the deeds had been really lost³.

1 *Ex p Morgan* (1806) 12 Ves 6.

2 *Mason v Morley (No 2)* (1865) 34 Beav 475. See also **LIEN** vol 68 (2008) PARAS 823, 854.

3 *Baskett v Skeel* (1863) 11 WR 1019.

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131. Sub-mortgage by deposit of title deeds.

A legal mortgagee might make an equitable sub-mortgage by deposit, and an equitable mortgage by deposit could be sub-mortgaged by redeposit without depositing the memorandum given on the original deposit¹. The derivative mortgagee had to deliver up the deeds to the original mortgagor upon being paid all that was actually due on the original deposit². A sub-mortgage by deposit of deeds relating to unregistered land did not need to be registered as a land charge³. A sub-mortgage of registered land might be created by deposit of a charge certificate⁴ or notice of intended deposit⁵. In the case of equitable interests in land or personalty, written notice of dealings had to be given to the trustees⁶.

1 *Re Hildyard, ex p Smith* (1842) 2 Mont D & De G 587.

2 *Matthews v Wallwyn* (1798) 4 Ves 118; *Turner v Smith* [1901] 1 Ch 213.

3 See PARA 120.

4 See PARA 120.

5 See PARA 122.

6 See the Law of Property Act 1925 s 137; and PARA 268.

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132. Equitable mortgage otherwise than by deposit.

A contract made before 27 September 1989¹ for the mortgage of land or an interest in land², except a mortgage by deposit of title deeds³, is not enforceable unless a memorandum or note of it was made in writing and signed by the party to be charged with it or some person lawfully authorised by him to do so⁴, or unless there has been part performance of the contract sufficient to take it out of the statutory requirement as to writing⁵.

An offer to give a security, signed by the debtor and accepted orally by the creditor, was sufficient⁶.

1 The date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 2 came into force: see ss 2(7), 5(3), (4); and PARA 118.

2 Examples of such an interest are a charge on rent to accrue due (*Re Whitting, ex p Hall* (1879) 10 ChD 615, CA) and a charge on trade fixtures (*Jarvis v Jarvis* (1893) 69 LT 412).

3 See PARA 119.

4 See the Law of Property Act 1925 s 40(1) (repealed by the Law of Property (Miscellaneous Provisions) Act 1989 ss 2(8), 4, Sch 2, except in relation to contracts made before 27 September 1989). See also *Lacon v Mertins* (1743) 3 Atk 1 at 4; and **CONTRACT** vol 9(1) (Reissue) PARA 624; **SALE OF LAND** vol 42 (Reissue) PARA 29.

5 See **CONTRACT** vol 9(1) (Reissue) PARA 626; **EQUITY** vol 16(2) (Reissue) PARA 410; **SALE OF LAND** vol 42 (Reissue) PARA 29. Payment of the consideration is not sufficient part performance: *Re Whitting, ex p Hall* (1879) 10 ChD 615 at 619, CA; *Clinan v Cooke* (1802) 1 Sch & Lef 22 at 40; *Maddison v Alderson* (1883) 8 App Cas 467 at 479, HL. See also *Steadman v Steadman* [1976] AC 536, [1974] 2 All ER 977, HL. As to the deposit of title deeds being sufficient part performance see PARA 120.

The re-enactment of the part of the Statute of Frauds (1677) s 4 (repealed) relating to contracts for the sale or other disposition of land in the Law of Property Act 1925 s 40 (repealed: see note 4) did not affect the law relating to part performance (see s 40(2) (repealed)), nor does s 53 (see PARA 139; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24) affect that law (see s 55(d)).

6 *Liverpool Borough Bank v Eccles* (1859) 4 H & N 139; *Warner v Willington* (1856) 3 Drew 523.

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(iii) Terms of Equitable Mortgages in Writing

133. In general.

The equitable mortgage should contain an undertaking by the mortgagor to execute a legal mortgage or charge when called upon to do so¹. Upon the execution of such a legal mortgage or charge, it seems that the equitable mortgage continues in existence notwithstanding the usual rule of merger of a lower in a higher security². The agreement should state expressly that the property is equitably charged with the repayment of the money advanced and interest,

although an equitable mortgage carries interest without such reference³. Where the agreement is under seal⁴ it should also contain a declaration by the mortgagor that he holds the property on trust for the mortgagee⁵ and, in addition or alternatively, a power of attorney⁶ for the mortgagee to convey the property in the mortgagor's name. Even without such a power, the equitable mortgagee, on exercising the statutory power of sale, may be able to convey the legal estate⁷, but the inclusion of the power makes the mortgagee's position certain.

1 See PARA 118.

2 As to the general rule see PARA 686.

3 *Re Drax, Savile v Drax* [1903] 1 Ch 781 at 794, 796, CA.

4 As to the statutory power of sale arising from a mortgage under seal see the Law of Property Act 1925 s 101; and PARA 443 et seq.

5 See further PARA 134.

6 See further PARA 135.

7 See *Re White Rose Cottage* [1965] Ch 940 at 951, [1965] 1 All ER 11 at 15, CA, per Lord Denning MR.

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134. Trust of the legal estate.

A declaration¹ by the mortgagor that he holds the property on trust for the mortgagee enables the mortgagee on exercising the power of sale² to vest the legal estate in the mortgaged property in himself or a purchaser³. The power of appointment of new trustees⁴ should be exercisable by the mortgagee and give the mortgagee and those deriving title under him power to remove the mortgagor from the trusteeship and to appoint himself or themselves or any of them as new trustees. On an appointment of new trustees the legal estate in the mortgaged property will vest in the new trustees⁵.

1 ie a declaration incorporated in the body of the equitable mortgage: see PARAS 118 et seq, 133.

2 As to the power of sale see PARA 440 et seq.

3 *London and County Banking Co v Goddard* [1897] 1 Ch 642.

4 As to the power of appointment of new trustees under the Trustee Act 1925 see s 36; and **TRUSTS** vol 48 (2007 Reissue) PARA 835 et seq. As to the appointment of new trustees generally see **TRUSTS** vol 48 (2007 Reissue) PARA 818 et seq.

5 See the Trustee Act 1925 s 40; and **TRUSTS** vol 48 (2007 Reissue) PARA 865 et seq.

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135. Power of attorney.

A power of attorney for the mortgagee to convey the property in the mortgagor's name may be included in the equitable mortgage as an alternative or in addition to the declaration of trust¹. The mortgagor irrevocably² appoints the mortgagee and the persons deriving title under him the attorney or attorneys of the mortgagor and the persons deriving title under him in his or their name and on his or their behalf to vest the legal estate in the mortgaged property in any purchaser or other person in exercise of the statutory powers³ conferred on mortgagees free and discharged from the mortgagor's right of redemption⁴. Where, in exercise of the statutory power of sale⁵, the mortgagee conveys the mortgaged property pursuant to such a power of attorney, it seems that the purchaser will take the property free from subsequent incumbrances as well as the mortgage in respect of which the power of sale is being exercised⁶.

1 As to the power of attorney generally see **AGENCY** vol 1 (2008) PARA 31 et seq.

2 As to powers of attorney expressed to be irrevocable see the Powers of Attorney Act 1971 s 4; and **AGENCY** vol 1 (2008) PARA 175.

3 As to the statutory powers see PARA 443 et seq.

4 As to the right of redemption see PARA 302 et seq.

5 As to the power of sale see PARA 443 et seq.

6 *Re White Rose Cottage* [1965] Ch 940, [1965] 1 All ER 11, CA.

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136. Provisions to be inserted in mortgage.

The written agreement to execute a mortgage must incorporate all terms which the parties have expressly agreed¹, but need not incorporate those implied by law². An agreement to execute a legal mortgage, with such powers and provisions and in such form as the mortgagee may require for further securing the principal money and interest, only extends to reasonable provisions, and does not enable the mortgagee to insert terms excluding the operation of the statutory provision³ which restricts consolidation of mortgages⁴, or extending the subject matter of the mortgage⁵. The mortgage should, however, contain a covenant for the payment of the debt and interest⁶; and, even where there is an agreement not to call in the money for a certain time, the mortgage must contain a proviso that the postponement is to be conditional on the punctual payment of interest⁷.

1 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1); and PARA 118.

2 *Blackburn v Walker* [1920] WN 291.

3 I.e the Law of Property Act 1925 s 93(1): see PARA 500.

4 *Farmer v Pitt* [1902] 1 Ch 954.

5 *Whitley v Challis* [1892] 1 Ch 64, CA (where an intended lessee agreed, when a lease of a hotel should be granted, to execute a valid second mortgage in such form and to contain such powers, covenants and provisions as the mortgagee's solicitor or counsel should require; it was held that this did not authorise the inclusion of the goodwill of the business in the mortgage).

6 *Saunders v Milsome* (1866) LR 2 Eq 573.

7 *Seaton v Twyford* (1870) LR 11 Eq 591.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(2) LEGAL AND EQUITABLE MORTGAGES/(iv) Registration of Equitable Mortgages of Land/137. Unregistered land.

(iv) Registration of Equitable Mortgages of Land

137. Unregistered land.

An equitable mortgage of unregistered land, without deposit, should be registered¹, for notice² and priority³ depend on the order of registration. An equitable mortgage secured by a deposit of documents relating to the legal estate affected is not registrable⁴.

1 See the Land Charges Act 1972 s 2(4)(iii)(a); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 631. The equitable mortgage would probably be void against a purchaser of a legal estate for money or moneys worth as an agreement to create a legal mortgage unless registered as an estate contract under s 2(4)(iv) (see **LAND CHARGES** vol 26 (2004 Reissue) PARA 632). If registered as an equitable charge under s 2(4)(iii), the equitable mortgage would, however, be protected as such and the mortgagee would have the remedies of an equitable chargee: see *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; *Murray v Guinness* [1998] NPC 79. As to charges of unregistered land see PARA 260 et seq.

2 See the Law of Property Act 1925 s 199; and PARA 279.

3 See the Law of Property Act 1925 s 97; the Law of Property Act 1969 s 17(1)(b); and PARA 261 et seq.

4 See the Land Charges Act 1972 s 2(4)(iii)(a); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 631. It is no longer possible to create an equitable mortgage by deposit alone: see PARA 118.

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138. Registered land.

Prior to 27 September 1989¹ the registered proprietor of land or of a charge could create a lien of the registered land or charge by the deposit of the land or charge certificate². A notice of deposit could be entered on the register³, or a notice or a caution might be registered⁴. Similarly an applicant for registration as proprietor of land or of a charge could, whether the land or charge was already registered or not, create a lien on it equivalent to that created by deposit of a certificate by giving to the registrar written notice of intention to deposit the land certificate when issued⁵. Whilst a registered notice of deposit or intended deposit remains uncanceled, it operates as a caution against dealings⁶. A notice will, however, be cancelled in respect of an equitable mortgage created after 27 September 1989 which is not in writing⁷.

A notice of deposit or intended deposit cannot now be registered⁸.

1 ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 2 came into force: see ss 2(7), 5(3), (4); and PARA 118.

2 See the Land Registration Act 1925 s 66 (repealed, subject to savings, by the Land Registration Act 2002 ss 134, 135, Schs 12, 13). As to the creation of an equitable mortgage by deposit of deeds see PARA 119 et seq. As to lien see also PARA 113.

- 3 See the Land Registration Rules 1925, SR & O 1925/1093, r 239 (revoked).
- 4 See *Re White Rose Cottage* [1965] Ch 940, [1965] 1 All ER 11, CA.
- 5 See the Land Registration Rules 1925, SR & O 1925/1093, r 240 (revoked).
- 6 See the Land Registration Rules 1925, SR & O 1925/1093, r 239 (revoked).
- 7 See *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; and PARA 118.
- 8 See, however, the Land Registration Act 2002 s 34 (which provides for the registration of an interest: see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 998) and s 134, Sch 12 para 2 (which preserves the effect of notices entered before 13 October 2003 under the Land Registration Act 1925 s 49(1) (repealed); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 992 et seq).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(2) LEGAL AND EQUITABLE MORTGAGES/(v) Equitable Mortgages of Personality/139. Necessity for writing.

(v) Equitable Mortgages of Personality

139. Necessity for writing.

A mortgage of an equitable interest subsisting at the time of the mortgage must be in writing signed by the mortgagor or his agent lawfully authorised in writing¹. This requirement applies to equitable interests in personality². Subject to this requirement, an equitable mortgage of personal property is not required to be in writing³.

1 Law of Property Act 1925 s 53(1)(c).

2 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 23-26. The requirement will apply to a mortgage of an equitable interest in shares: *Grey v IRC* [1960] AC 1, [1959] 3 All ER 603, HL; *Oughtred v IRC* [1960] AC 206, [1959] 3 All ER 623, HL. As to the requirements for an equitable interest in land see PARA 118.

3 *Tibbits v George* (1836) 5 Ad & El 107; *Gurnell v Gardner* (1863) 4 Giff 626; *Riccard v Prichard* (1855) 1 K & J 277 at 279; *Brown, Shipley & Co v Kough* (1855) 29 ChD 848 at 854, CA; *Parish v Poole* (1884) 53 LT 35 at 38. As to oral mortgages of personal chattels, and as to the formalities required where a mortgage of such chattels is in writing, see PARA 231. As to models by which the equitable assignment of choses or things in action may be effected see **CHOSSES IN ACTION** vol 13 (2009) PARA 24 et seq.

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140. Effect of deposit of share certificate.

A deposit of share certificates, with a transfer executed by the registered holders, but in blank as to the date and the names of the transferee, constitutes an equitable mortgage¹; and, where transfers are not required to be by deed, the transferee as equitable mortgagee has implied authority to complete his security by filling up the transfer and obtaining registration².

1 *Stubbs v Slater* [1910] 1 Ch 632, CA; *London and Midland Bank v Mitchell* [1899] 2 Ch 161; *France v Clark* (1884) 26 ChD 257, CA.

² *France v Clark* (1884) 26 ChD 257, CA; *Re Kimberley North Block Diamond Mining Co, ex p Wernher* (1888) 58 LT 305. See further PARA 237; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 978-983; **COMPANIES** vol 14 (2009) PARA 401.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(2) LEGAL AND EQUITABLE MORTGAGES/(v) Equitable Mortgages of Personalty/141. Agreement to charge.

141. Agreement to charge.

An agreement to charge personal estate made for valuable consideration operates as a valid equitable charge¹. Such an agreement will not be enforced in favour of a volunteer².

¹ See PARA 239.

² See PARA 239.

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142. Mortgages of equitable interests.

Personal property in the possession or under the legal dominion of third persons may be the subject of a valid charge by the equitable owner in favour of his creditor¹. Accordingly, choses or things in action², such as debts or funds in the hands of trustees and including future choses in action and after-acquired property, are assignable by way of security³. For an equitable assignment by way of charge, notice is necessary as between assignee and debtor but not as between assignor and debtor, and, in order to obtain priority, the notice must be in writing⁴. It seems that an equitable charge may be created over a bank deposit in favour of the bank⁵.

¹ Formerly at law no possibility, right, title or thing in action could be assigned to a stranger (*Lampet's Case* (1612) 10 Co Rep 46b); but from early times assignments of a mere naked possibility or of a chose in action for valuable consideration were held valid in courts of equity (*Squib v Wyn* (1717) 1 P Wms 378; *Row v Dawson* (1749) 1 Ves Sen 331). See further **CHOSSES IN ACTION** vol 13 (2009) PARA 24 et seq.

² As to choses or things in action generally see **CHOSSES IN ACTION** vol 13 (2009) PARA 1 et seq; and as to equitable assignments see **CHOSSES IN ACTION** vol 13 (2009) PARA 24 et seq.

³ *Ryall v Rowles* (1750) 1 Ves Sen 348 at 364; 1 White & Tud LC (9th Edn) 90; *Tailby v Official Receiver* (1888) 13 App Cas 523, HL; *Re Clarke, Coombe v Carter* (1887) 36 ChD 348, 352, CA; *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130, DC; *Elders Pastoral Ltd v Bank of New Zealand (No 2)* [1990] 1 WLR 1478, PC; and see **CHOSSES IN ACTION** vol 13 (2009) PARAS 30, 31. Although a general charge purporting to extend to the whole of the mortgagor's after-acquired property may possibly be unenforceable as such, it is enforceable against ascertainable property falling within a class of property specifically included in the charge: see PARA 103.

⁴ See PARA 267 et seq.

⁵ *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL. But see *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289; affd [1989] Ch 497, [1988] 3 All ER 702, CA.

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143. Assignment subject to equities.

As between the assignor and assignee of a debt¹ or of a fund in the hands of trustees², the assignee's title is complete even though no notice is given to the debtor or the trustee. Notice, however, should be given to the debtor or trustee to prevent payment to the assignor, for such payment by the debtor or trustee, without knowledge of the assignment, operates as a satisfaction of the debt or claim³. Where the debtor has been released in a general settlement of accounts the release is equally effectual⁴. An assignor can give no greater right in equity than he himself has⁵, and a mortgagee of a chose or thing in action takes subject to all equities between the debtor and creditor existing or arising out of circumstances existing before notice is given of the assignment, whether or not the mortgagee has notice of them at the time of taking the assignment⁶. The debtor or holder of the fund may not, however, alter his rights to the prejudice of the assignee after notice of the assignment⁷.

1 *Pickering v Ilfracombe Rly Co* (1868) LR 3 CP 235 at 248; *Robinson v Nesbitt* (1868) LR 3 CP 264 at 267; *Re Irving, ex p Brett* (1877) 7 ChD 419 at 421; *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 ChD 128, CA.

2 *Ward v Duncombe* [1893] AC 369 at 392, HL; and see **CHOSSES IN ACTION** vol 13 (2009) PARA 60 et seq.

3 *Norrish v Marshall* (1821) 5 Madd 475; *Stocks v Dobson* (1853) 4 De GM & G 11; *Re Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 ChD 178; *Ward v Duncombe* [1893] AC 369 at 392, HL. In order to obtain priority for the assignment, the notice must be in writing (see the Law of Property Act 1925 s 137(3); and PARA 268), although in earlier times it was not essential that the notice should be express notice given by the assignee (*Lloyd v Banks* (1868) 3 Ch App 488).

4 *Stocks v Dobson* (1853) 4 De GM & G 11.

5 *Roxburghe v Cox* (1881) 17 ChD 520 at 526, CA; *Webb v Smith* (1885) 30 ChD 192 at 199, CA.

6 *Brice v Bannister* (1878) 3 QBD 569 at 578, CA, per Cotton LJ; *Cavendish v Geaves* (1857) 24 Beav 163; *Rolt v White* (1862) 31 Beav 520 (affd 3 De GJ & Sm 360); *Stoddart v Union Trust Ltd* [1912] 1 KB 181, CA. See generally **CHOSSES IN ACTION** vol 13 (2009) PARA 60 et seq. As to the special case of a trustee who is also entitled to a share in the trust estate see **CHOSSES IN ACTION** vol 13 (2009) PARA 65.

7 *Bradford Banking Co v Briggs, Son & Co Ltd* (1886) 12 App Cas 29, HL. See also PARA 267.

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(vi) Remedies of an Equitable Mortgagee

144. In general.

An equitable mortgagee is entitled to possession if there is a special agreement or the court so orders¹. He may appoint a receiver if empowered to do so expressly or by statute; otherwise an application to the court is necessary². If an express or statutory power exists he may sell the property³ and may have express powers enabling him to convey the legal estate⁴. He may

obtain an order for sale⁵, specific performance⁶, or foreclosure⁷; and he may, instead of proceeding against the security, bring a claim on the personal covenant⁸.

1 See PARA 403.

2 See PARAS 403, 475 et seq.

3 See PARA 440 et seq. As to completion of share transfers in blank see **COMPANIES** vol 14 (2009) PARA 401.

4 See PARAS 134-135.

5 See PARA 616 et seq.

6 See PARA 145.

7 See PARA 568. As to foreclosure generally see PARA 566 et seq.

8 See PARA 535.

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145. Specific performance.

An equitable mortgage is a specifically enforceable contract to create a legal mortgage¹. Specific performance will normally be ordered of an agreement to execute a legal mortgage of land², even though the legal mortgage when executed will confer on the mortgagee an immediate power of sale³, so long as valuable consideration is given⁴. If the party agreeing to grant a mortgage over property only has a limited interest in the property, the court may order him to execute a charge over such interest as he has⁵.

Valuable consideration may be given by the payment of money⁶ or forbearance from suing⁷. The court will not, however, grant specific performance of a purely executory agreement to make or take a loan of money⁸, whether the loan is to be secured or not⁹, except in the case of a contract to take debentures in a limited company¹⁰, but the aggrieved party has a remedy in damages for breach of contract¹¹.

1 *Swiss Bank Corpn v Lloyds Bank Ltd* [1982] AC 584, [1980] 2 All ER 419, CA; affd [1982] AC 584, [1981] 2 All ER 449, HL. As to the nature of an equitable mortgage see PARA 105.

2 *Swiss Bank Corpn v Lloyds Bank Ltd* [1982] AC 584, [1980] 2 All ER 419, CA; affd [1982] AC 584, [1981] 2 All ER 449, HL.

3 *Hermann v Hodges* (1873) LR 16 Eq 18; *Ashton v Corrigan* (1871) LR 13 Eq 76; *Matthews v Goodday* (1861) 31 LJCh 282.

4 *Jeffreys v Jeffreys* (1841) Cr & Ph 138. A seal is not sufficient: *Houghton v Lees* (1854) 1 Jur NS 862.

5 *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA; *Bankers Trust Co v Namdar* [1997] NPC 22, CA.

6 See *Hunter v Lord Langford* (1828) 2 Mol 272; *Sichel v Mosenthal* (1862) 30 Beav 371; *Rogers v Challis* (1859) 27 Beav 175; *Western Wagon and Property Co v West* [1892] 1 Ch 271; *Larios v Bonany y Gurety* (1873) LR 5 PC 346. As to payment as part performance see PARA 132.

7 *Alliance Bank Ltd v Broom* (1864) 2 Drew & Sm 289; *Fullerton v Provincial Bank of Ireland* [1903] AC 309, HL.

8 The agreement remains executory if no money has been actually advanced.

9 *Hunter v Lord Langford* (1828) 2 Mol 272; *Sichel v Mosenthal* (1862) 30 Beav 371; *Rogers v Challis* (1859) 27 Beav 175; *Western Wagon and Property Co v West* [1892] 1 Ch 271; *Larios v Bonany y Gurety* (1873) LR 5 PC 346.

10 See the Companies Act 2006 s 740; and **COMPANIES** vol 15 (2009) PARA 1312.

11 See **DAMAGES** vol 12(1) (Reissue) PARA 1063.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(3) COLLATERAL TRANSACTIONS ACCOMPANYING MORTGAGES/(i) Suretyship/146. Suretyship.

(3) COLLATERAL TRANSACTIONS ACCOMPANYING MORTGAGES

(i) Suretyship

146. Suretyship.

Third persons may be made parties to mortgages in order to guarantee¹ the payment of principal and interest or interest alone, the performance of covenants, or the maintenance of the security. Where co-owners grant a charge to secure the debts of one of them, the other is a surety². Although a surety undertakes only for the default of another, the practice in mortgage deeds is to make him contract and become bound as a principal so far as concerns the mortgagee, but to let him remain a surety so far as concerns the mortgagor. A mortgagee is entitled to the costs of all proceedings reasonably taken, including proceedings to obtain payments from a surety³.

1 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1142-1145.

2 As to the effect of such a charge see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1152. As to the equity of exoneration see PARAS 629, 636-638.

3 *National Provincial Bank of England v Games* (1886) 31 ChD 582, CA. See also PARA 739 et seq.

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147. Mortgagee may be affected by a wrong committed by another.

A mortgagor whose suretyship was procured by the undue influence, misrepresentation or other legal wrong of the debtor can set aside the mortgage if either the debtor was acting as the mortgagee's agent¹ or the mortgagee had actual or constructive notice of the conduct of the debtor which vitiated the surety's consent². The burden of proving that the mortgagee had actual or constructive notice that the surety's consent was improperly obtained is on the surety³. If the mortgagee knows of certain facts which put him on inquiry as to the fact that the surety's concurrence may have been procured by the misconduct of a third party, and he fails to take such steps as are reasonable to reduce the risk that the surety entered into the transaction under any misapprehension or as a result of undue influence, he will have

constructive notice that the surety's concurrence was procured improperly⁴. If he does take such reasonable steps, he takes free from the rights of the surety⁵.

1 Although there may be cases where, without artificiality, it can properly be held that a husband was acting as the agent of the creditor in procuring his wife to stand as surety, such cases will be very rare: *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 195, [1993] 4 All ER 417 at 428, HL, per Lord Browne-Wilkinson; *Bradford and Bingley Building Society v Chaddock* (1996) 72 P & CR D28, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

2 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 195, [1993] 4 All ER 417 at 428, HL, per Lord Browne-Wilkinson; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [38]-[40], [2002] 2 AC 773 at [38]-[40], [2001] 4 All ER 449 at [38]-[40] per Lord Nicholls of Birkenhead, and at [143]-[146] per Lord Scott of Foscote.

3 *Barclays Bank plc v Boulter* [1999] 4 All ER 513, [1999] 3 FCR 529, HL.

4 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [41], [2002] 2 AC 773 at [41], [2001] 4 All ER 449 at [41] per Lord Nicholls of Birkenhead; *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 195, [1993] 4 All ER 417 at 429, HL. See also *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA.

5 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

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148. When the mortgagee is put on inquiry.

A mortgagee is put on inquiry if the relationship between surety and debtor is known to the mortgagee and raises a legal presumption of undue influence¹. A mortgagee is also put on inquiry if:

- 1 (1) the transaction is not on its face advantageous to the surety; and
- 2 (2) the mortgagee knows that the surety and debtor are married or cohabiting, or that the surety places trust and confidence in the debtor in relation to the management of his or her financial affairs².

The effect of this is that a mortgagee is on inquiry whenever he wishes to obtain a guarantee and the relationship between the surety and the debtor is 'non-commercial'³.

Thus a mortgagee is put on inquiry where a mortgagor offers to stand surety for the debts of his or her spouse⁴. The same situation obtains in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship⁵: cohabitation is not essential⁶.

Where a wife stands surety for the debts of a company whose shares are held by her and her husband, the mortgagee is put on inquiry even when the wife is a director or secretary of the company, because the shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business⁷. However, where money is advanced to a husband and wife jointly, the mortgagee is not put on inquiry unless it is aware that the loan is being made for the purposes of one of them alone, as distinct from their joint purposes⁸, or the mortgage also secures all monies due from either of them⁹. A remortgage of joint liabilities with a different lender would not normally put a lender on inquiry¹⁰, but a lender who is on inquiry in relation to one mortgage is also on inquiry in relation to a remortgage¹¹.

A mortgagee is not required to inquire into the personal relationship between debtor and mortgagee or as to the personal motives of the surety for wanting to help the debtor¹².

- 1 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. The relationship between husband and wife or co-habitees does not give rise to such a presumption: *Royal Bank of Scotland v Etridge (No 2)*. For cases in which it does arise see **EQUITY** vol 16(2) (Reissue) PARA 417 et seq; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1045-1046; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 843 et seq.
- 2 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [14], [21], [2002] 2 AC 773 at [14], [21], [2001] 4 All ER 449 at [14], [21] per Lord Nicholls of Birkenhead. In the same case Lord Scott of Foscote held that the existence of trust and confidence will be assumed where a husband and wife live together, and that a mortgagee will be required to adduce evidence to rebut the existence of trust and confidence in such cases: see *Royal Bank of Scotland plc v Etridge (No 2)* at [159].
- 3 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [87], [2002] 2 AC 773 at [87], [2001] 4 All ER 449 at [87] per Lord Nicholls of Birkenhead. Examples of a commercial relationship are where the grantor is paid a fee, or a company is guaranteeing the debts of another company in the same group: see *Royal Bank of Scotland plc v Etridge (No 2)* at [88] per Lord Nicholls of Birkenhead.
- 4 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [44]-[46], [2002] 2 AC 773 at [44]-[46], [2001] 4 All ER 449 at [44]-[46] per Lord Nicholls of Birkenhead, and at [110]-[111] per Lord Hobhouse of Woodborough; *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL.
- 5 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 198, [1993] 4 All ER 417 at 431, HL, per Lord Browne-Wilkinson; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [47], [2002] 2 AC 773 at [47], [2001] 4 All ER 449 at [47] per Lord Nicholls of Birkenhead.
- 6 *Massey v Midland Bank plc* [1995] 1 All ER 29 at 33, [1994] 2 FLR 342 at 345, CA, per Steyn J; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [47], [2002] 2 AC 773 at [47], [2001] 4 All ER 449 at [47] per Lord Nicholls of Birkenhead.
- 7 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [49], [2002] 2 AC 773 at [49], [2001] 4 All ER 449 at [49] per Lord Nicholls of Birkenhead.
- 8 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Britannia Building Society v Pugh* [1997] 2 FLR 7, 29 HLR 423, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [48], [2002] 2 AC 773 at [48], [2001] 4 All ER 449 at [48] per Lord Nicholls of Birkenhead.
- 9 *Midland Bank v Greene* [1995] 1 FCR 365, [1994] 2 FLR 827. If the security was intended only to secure joint liabilities it may be treated as such: *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, [1998] 2 FLR 457, CA.
- 10 *Scotlife Home Loans (No 2) Ltd v Hedworth* (1996) 28 HLR 771, CA; *UCB Bank plc v Hedworth* [2003] EWCA Civ 1717, [2003] 3 FCR 739.
- 11 *Yorkshire Bank plc v Tinsley* [2004] EWCA Civ 816, [2004] 3 All ER 463, [2004] 1 WLR 2380.
- 12 *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA.

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149. When knowledge of a solicitor is imputed to the mortgagee.

A solicitor often acts for the mortgagee and the mortgagor in relation to the mortgage. The solicitor's knowledge of facts which would put the mortgagee on inquiry is not to be imputed to the mortgagee bank unless the information came to his knowledge in his capacity as solicitor for the mortgagee bank as such¹. Thus knowledge of a solicitor acquired when taking instructions from or giving advice to the surety is not to be imputed to the mortgagee². The

mortgagee does not have imputed knowledge of facts and matters which would have come to his knowledge if he had made inquiries relating to matters other than whether it would obtain good security, such as the credit status of a borrower³.

1 See the Law of Property Act 1925 s 199(1)(ii)(b). An objective test is applied for the purpose of determining whether any fact learned by the mortgagee's solicitor ought to be treated as having been learned by the mortgagee: *Woolwich plc v Gomm* (1999) 79 P & CR 61, CA.

2 *Halifax Mortgage Services Ltd v Stepsky* [1996] Ch 207, [1996] 2 All ER 277, CA; *Barclays Bank v Thomson* [1997] 4 All ER 816, [1997] 1 FCR 541, CA; *National Westminster Bank v Beaton* (1997) 30 HLR 99, (1997) 74 P & CR D19, CA. See also *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

3 *Abbey National plc v Tufts* [1999] 2 FLR 399, CA.

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150. How the mortgagee may avoid constructive notice.

A creditor mortgagee who is put on inquiry will have constructive notice of the surety's rights unless he takes reasonable steps to ensure that the surety understood the nature and effect of the proposed surety transaction¹. Where, for example, the mortgagee knows only that a wife is to stand surety for her husband's debts, these requirements will normally have been satisfied if the mortgagee insists that the wife attend a private meeting (in the absence of the husband) with a representative of the mortgagee at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice². Where the mortgagee does not wish to advise the surety himself, he must, in order to avoid being fixed with constructive notice, either communicate directly with the surety wife³ (in which case he should not proceed with the transaction until he has received an appropriate response directly from the wife)⁴, or, if he chooses not to explain the nature and implications of the transaction to the wife, must provide the wife's solicitor with sufficient financial information for this purpose⁵.

Ordinarily it will not matter whether the solicitor advising the surety wife is also acting for the mortgagee in arranging for the completion of the security, or that he is also the husband's solicitor⁶; if, however, outside the ordinary course of events the mortgagee suspects the debtor of misrepresentation or undue influence, he must inform the wife's solicitor of the facts creating that suspicion or be fixed with constructive notice of any impropriety that does occur⁷.

The essence of the duty of the surety wife's solicitor is to explain to her the nature and effect of the transaction⁸, and it is accordingly necessary in all cases that, to avoid being fixed with constructive notice, the mortgagee obtains written confirmation from that solicitor that he has fully explained to the wife the nature of the documents and the practical implications they will have for her⁹.

1 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

2 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 196-197, [1993] 4 All ER 417 at 429-430, HL, per Lord Browne-Wilkinson. See also *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [54], [2002] 2 AC 773 at [54], [2001] 4 All ER 449 at [54] per Lord Nicholls of Birkenhead, at [147]-[148], [163], [165] per Lord Scott of Foscote, and cf at [111] per Lord Hobhouse of Woodborough.

3 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [79(1)], [2002] 2 AC 773 at [79(1)], [2001] 4 All ER 449 at [79(1)] per Lord Nicholls of Birkenhead, who said that the mortgagee should inform the wife that for her own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her; should tell her that the purpose of this requirement is that thereafter she should not be able to dispute that she is legally bound by the documents once she has signed them; should ask her to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the mortgagee; should tell her that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction; should ask her, where the solicitor is already acting for both her and her husband, whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor.

4 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [79(1)], [2002] 2 AC 773 at [79(1)], [2001] 4 All ER 449 at [79(1)] per Lord Nicholls of Birkenhead.

5 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [79(2)], [2002] 2 AC 773 at [79(2)], [2001] 4 All ER 449 at [79(2)] per Lord Nicholls of Birkenhead. Such information is confidential and the debtor's consent is usually required for disclosure, although consent may be implied from the husband's proposal that the wife stand as surety: *Royal Bank of Scotland plc v Etridge (No 2)* at [79(2)] per Lord Nicholls of Birkenhead, and at [190] per Lord Scott of Foscote. The lender does not owe any general duty of disclosure to the surety wife (*Royal Bank of Scotland plc v Etridge (No 2)* at [114] per Lord Hobhouse of Woodborough, and at [189] per Lord Scott of Foscote), nor does it add to the general disclosure obligations owed by creditors to prospective sureties (*Royal Bank of Scotland plc v Etridge (No 2)* at [81] per Lord Nicholls of Birkenhead, at [114] per Lord Hobhouse of Woodborough, and at [183]-[188] per Lord Scott of Foscote).

6 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [174], [2002] 2 AC 773 at [174], [2001] 4 All ER 449 at [174] per Lord Scott of Foscote.

7 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [79(3)], [2002] 2 AC 773 at [79(3)], [2001] 4 All ER 449 at [79(3)] per Lord Nicholls of Birkenhead.

8 In *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [58]-[63], [2002] 2 AC 773 at [58]-[63], [2001] 4 All ER 449 at [58]-[63] per Lord Nicholls of Birkenhead, and at [181]-[182], [374] per Lord Scott of Foscote, the House of Lords expressly disapproved the Court of Appeal's broader conception of the duty (cf also at [112] per Lord Hobhouse of Woodborough).

9 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [79(4)], [2002] 2 AC 773 at [79(4)], [2001] 4 All ER 449 at [79(4)] per Lord Nicholls of Birkenhead, and at [175] per Lord Scott of Foscote. The creditor mortgagee is under an independent duty to a surety to disclose contractual arrangements made between the debtor and the creditor mortgagee which make the terms of the principal contract materially different in a potentially disadvantageous respect from those which a surety might naturally expect: *Levett v Barclays Bank plc* [1995] 2 All ER 615, [1995] 1 WLR 1260. See also PARA 151; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1040.

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151. Effect of legal advice.

On the matter of when a creditor mortgagee who is put on inquiry will have constructive notice of a surety's rights¹, case-law, which mainly involves a debtor husband and a surety wife, establishes that:

- 3 (1) it is not, in general, enough that the mortgagee knows merely that the surety has a solicitor acting for her: that would not normally be sufficient to constitute the taking of reasonable steps to ensure that the nature of the risks to her arising out of the transaction have been made clear to her²;
- 4 (2) on the other hand, in the absence of special circumstances it would be sufficient if the mortgagee knew that the surety's solicitor had been instructed to give independent advice to her on the nature and effect of the transaction and had

received confirmation that such advice had been given³; where the mortgagee has asked a solicitor to explain that transaction to the surety and there is no confirmation that the solicitor has done so, the mortgagee is not entitled to assume that he has and is on inquiry as to whether the solicitor has in fact advised the surety⁴;

- 5 (3) when giving advice to the surety, the solicitor is acting exclusively as the surety's solicitor⁵; it makes no difference whether he is unconnected with the debtor or the surety⁶ or is also the debtor's solicitor⁷ or that he has agreed to act in a ministerial capacity as the mortgagee's agent at completion⁸; whoever introduces the solicitor to the surety and asks him to advise the surety, and whoever is responsible for his fees, the mortgagee is entitled to expect the solicitor to regard himself as owing a duty to the surety alone when giving the surety advice⁹; if the solicitor accepts the mortgagee's instructions to advise the surety, he still acts as the surety's solicitor and not the mortgagee's solicitor when he interviews the surety¹⁰;
- 6 (4) the mortgagee is entitled to rely on the fact that the solicitor undertook the task of explaining the transaction to the surety as showing that he considered himself to be sufficiently independent for this purpose¹¹ and is not required to question the solicitor's independence, even if the mortgagee knows that he is also the debtor's solicitor¹²; and
- 7 (5) the mortgagee is not concerned to question the sufficiency of the advice; if the solicitor fails properly to explain the security transaction, his knowledge of the failure is not to be imputed to the mortgagee, even though the mortgagee asked the solicitor to advise the surety¹³, and the mortgagee will be fixed with constructive notice only if he knows or has reason to suspect that the solicitor has failed properly to advise the surety, or knows facts from which he ought to have realised that the surety has not received the appropriate advice, and does nothing to remedy the situation¹⁴.

Ultimately the issue is whether the surety has had brought home to her in a meaningful way the practical implications of the proposed transaction¹⁵. This does not wholly eliminate the risk that the transaction was procured by misrepresentation or undue influence, but it does ensure that the surety was fully aware of the basic elements of the transaction¹⁶.

1 See PARA 150.

2 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449; *Lloyds TSB Bank plc v Holdgate* [2002] EWCA Civ 1543, [2003] HLR 335; *First National Bank plc v Achampong* [2003] EWCA Civ 487, [2004] 1 FCR 18.

3 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449; *First National Bank plc v Achampong* [2003] EWCA Civ 487, [2004] 1 FCR 18.

4 *Bank Melli Iran v Samadi-Rad* [1995] 3 FCR 735, [1995] 2 FLR 367, CA; *Cooke v National Westminster Bank* [1998] 3 FCR 643, [1998] 2 FLR 783, CA.

5 *Midland Bank v Serter* [1995] 3 FCR 711, 27 HLR 647, CA; *Barclays Bank plc v Thomson* [1997] 4 All ER 816, [1997] 1 FCR 541, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

6 *Barclays Bank plc v Thomson* [1997] 4 All ER 816, [1997] 1 FCR 541, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

7 *Midland Bank v Serter* [1995] 3 FCR 711, 27 HLR 647, CA; *Midland Bank plc v Massey* [1994] 2 FLR 342, [1994] NPC 44, CA; *Banco Exterior Internacional v Mann* [1995] 1 All ER 936, [1995] 1 FLR 602, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

8 *Midland Bank v Serter* [1995] 3 FCR 711, 27 HLR 647, CA; *Halifax Mortgage Services Ltd v Stepsky* [1996] Ch 207, [1996] 2 All ER 277, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

9 *Barclays Bank plc v Thomson* [1997] 4 All ER 816, [1997] 1 FCR 541, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

10 *Barclays Bank plc v Thomson* [1997] 4 All ER 816, [1997] 1 FCR 541, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

11 *Banco Exterior Internacional v Mann* [1995] 1 All ER 936, [1995] 1 FLR 602, CA; *Bank of Baroda v Rayarel* [1995] 2 FCR 631, 27 HLR 387, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

12 *Midland Bank plc v Massey* [1994] 2 FLR 342, [1994] NPC 44, CA; *Bank of Baroda v Rayarel* [1995] 2 FCR 631, 27 HLR 387, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

13 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [77], [2002] 2 AC 773 at [77], [2001] 4 All ER 449 at [77] per Lord Nicholls of Birkenhead.

14 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [57], [2002] 2 AC 773 at [57], [2001] 4 All ER 449 at [57] per Lord Nicholls of Birkenhead, and at [175] per Lord Scott of Foscote.

15 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [54], [2002] 2 AC 773 at [54], [2001] 4 All ER 449 at [54] per Lord Nicholls of Birkenhead.

16 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [54], [2002] 2 AC 773 at [54], [2001] 4 All ER 449 at [54] per Lord Nicholls of Birkenhead, and at [148], [226] per Lord Scott of Foscote.

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152. The remedy of the mortgagor.

The remedy of a mortgagor who executed the mortgage as a result of misrepresentation or undue influence is rescission of the mortgage, although a mortgagor is entitled to rescind a mortgage or other transaction only if he restores the benefits received¹. A transaction may be set aside even though it is impossible to place the parties in precisely the position they were in before if the court can achieve practical justice between the parties². If restitution cannot be made, the claim to rescission fails³.

The court has no power to set aside the charge in part only or to impose terms⁴.

1 *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, [1998] 2 FLR 457, CA.

2 *Spence v Crawford* [1939] 3 All ER 271, HL; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Cheese v Thomas* [1994] 1 All ER 35, [1994] 1 WLR 129, CA; *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, [1998] 2 FLR 457, CA.

3 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, [1998] 2 FLR 457, CA.

4 *TSB Bank plc v Camfield* [1995] 1 All ER 951, [1995] 1 WLR 430, CA; *Castle Phillips Finance v Piddington* [1996] 1 FCR 269, (1994) 70 P & CR 592, CA; *UCB Bank plc v Hedworth* [2003] EWCA Civ 1717, [2003] 3 FCR 739, CA.

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153. Remedies of mortgagee where legal charge is set aside.

Where a mortgage is set aside, the mortgagee may have the benefit of an equitable mortgage¹, or be subrogated to the rights under an earlier mortgage², or be entitled to a restitutionary remedy³. If the mortgage is only set aside as against one co-owner, it may take effect as an equitable charge over the beneficial interest of the other co-owner⁴.

1 See PARA 240.

2 See PARAS 384-385.

3 See **CONTRACT** vol 9(1) (Reissue) PARA 1092 et seq.

4 See PARAS 194, 241.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/1. DEFINITION AND CLASSIFICATION/(3) COLLATERAL TRANSACTIONS ACCOMPANYING MORTGAGES/(ii) Bonds/154. Bonds.

(ii) Bonds

154. Bonds.

A bond by way of collateral security to a mortgage was formerly given, by an instrument separate from the conveyance of the property, for the purpose of enabling the mortgagee to sue in debt¹; but because an equally effective remedy is given by the covenant for payment in a mortgage², the bond has fallen into disuse³.

1 The court will not allow the creditor to levy execution for more than the amount due when judgment is obtained: see *Darby v Wilkins* (1733) 2 Stra 957; *Masfen v Touchet* (1770) 2 Wm Bl 706; *Talbot v Hodson* (1816) 7 Taunt 251 at 256.

2 See PARA 207 et seq.

3 Occasionally, a promissory note accompanies a mortgage. The doctrine of merger (see PARA 673 et seq) will apply unless there is a declaration to the contrary.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(i) In general/155. Owners.

2. PARTIES TO MORTGAGES

(1) ABSOLUTE OWNERS OF PROPERTY

(i) In general

155. Owners.

An absolute owner of property who is not under any incapacity¹, in exercise of the plenary powers of alienation with which the law invests an absolute owner may mortgage the property². Further, a registered³ proprietor⁴ is entitled to exercise owner's powers in relation to a registered estate or charge⁵: in relation to a registered estate these powers consist of power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise⁶, and power to charge the estate at law with the payment of money⁷; in relation to a registered charge these powers consist of power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage⁸, and power to charge at law with the payment of money indebtedness secured by the registered charge⁹.

1 As to persons under disability see PARAS 157-161.

2 See Co Litt 223a. As to restrictions on alienation see **GIFTS** vol 52 (2009) PARA 254; **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1268 et seq; **REAL PROPERTY** vol 39(2) (Reissue) PARA 231.

3 'Registered' means entered in the register of title: see the Land Registration Act 2002 s 132(1). As to the register of title and registration therein see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq.

4 Or a person entitled to be registered as the proprietor: Land Registration Act 2002 s 24(b).

5 Land Registration Act 2002 s 24(a). As to this entitlement see further **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 908. 'Charge' means any mortgage, charge or lien for securing money or money's worth: s 132(1).

6 See the Land Registration Act 2002 s 23(1)(a); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906.

7 Land Registration Act 2002 s 23(1)(b).

8 See the Land Registration Act 2002 s 23(2)(a); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 907. For these purposes, 'legal sub-mortgage' means a transfer by way of mortgage (s 23(3)(a)), a sub-mortgage by sub-demise (s 23(3)(b)), and a charge by way of legal mortgage (s 23(3)(c)). As to the meaning of 'legal mortgage' see PARA 104 note 1; definition applied by s 132(1).

9 Land Registration Act 2002 s 23(2)(b). See further PARA 251.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(i) In general/156. Co-owners.

156. Co-owners.

Where more persons than one own land, they may be beneficially interested in the land either jointly or as tenants in common, but in either case the legal estate in the land will be held by not more than four of the co-owners as joint tenants upon trust for the co-owners as joint tenants in common¹. The co-owners may mortgage the land under trustees' statutory powers². Where, however, the same persons are both the trustees and the beneficiaries, they may mortgage as absolute owners³.

Where a legal mortgage of land is made to several persons, the legal estate vests in the mortgagees or the first four named as joint tenants upon trust⁴. Where the mortgage is made to several mortgagees jointly or the mortgage money is expressed to belong to them on a joint account, that money is, as between the mortgagees and the mortgagor, deemed to be and remain money belonging to the mortgagees on a joint account, unless the contrary is expressed in the mortgage⁵. Persons dealing in good faith with several mortgagees may

assume, unless the contrary is expressed in the instruments relating to the mortgage, that the mortgagees are entitled to the mortgage money on a joint account⁶.

1 See the Law of Property Act 1925 ss 34, 36; the Settled Land Act 1925 s 36; the Trustee Act 1925 s 34; and **REAL PROPERTY** vol 39(2) (Reissue) PARAS 190, 211; **SETTLEMENTS** vol 42 (Reissue) PARA 713; **TRUSTS** vol 48 (2007 Reissue) PARAS 804, 822.

2 As to the statutory powers of trustees see PARAS 176-177. As to liability where there are several mortgagors see PARA 629.

3 A purported mortgage by one co-owner may operate as a mortgage of his beneficial interest: cf *Cedar Holdings Ltd v Green* [1981] Ch 129, [1979] 3 All ER 117, CA; *Ahmed v Kendrick* (1987) 56 P & CR 120, [1988] 2 FLR 22, CA. See also PARAS 194, 240-241.

4 Cf the text to note 1.

5 See the Law of Property Act 1925 s 111; and PARA 212.

6 See the Law of Property Act 1925 s 113(1)(a); and PARA 373. See also PARA 212.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(ii) Persons under Disability/A. MINORS/157. Minors.

(ii) Persons under Disability

A. MINORS

157. Minors.

A minor¹ cannot hold a legal estate and hence cannot create a legal mortgage of land². A minor can avoid a contract to create a mortgage or charge³ or a charge over his equitable interest until a reasonable time after attaining majority⁴. He can, however, ratify such a transaction after attaining his majority. Where a contract is unenforceable against a minor, or he repudiates it, because he was a minor when it was made, the court may require the minor to transfer any property acquired under the contract or any property representing it⁵.

Where, however, a minor is beneficially entitled to any property, the court may, with a view to the application of the capital or income for the minor's maintenance, education or benefit, direct the trustees to raise money by mortgage of the property⁶. A mortgage in favour of a minor takes effect as a trust in favour of the minor and a mortgage to a minor and another person of full age vests the legal estate in the other person upon trust for himself and the minor⁷.

1 A 'minor' is a person under the age of 18: see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 1-3.

2 See the Law of Property Act 1925 s 1(6). See also **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 25, 30; **REAL PROPERTY** vol 39(2) (Reissue) PARA 54. As to the meaning of 'legal estate' see PARA 105 note 2.

3 *Edwards v Carter* [1893] AC 360, HL.

4 *Edwards v Carter* [1893] AC 360, HL. To some degree a minor may also avoid a contract for the repayment of money lent to him during his minority, although this power is restricted in relation to contracts coming into being after 9 June 1987 (ie the date on which the Minors Contracts Act 1987 came into force, repealing the Infants Relief Act 1874 (which rendered void contracts with minors for the repayment of money other than contracts for necessities) and providing that where a guarantee is given in respect of an obligation of a party to

a contract after that date which is unenforceable against him because he is a minor, the guarantee is not for that reason alone unenforceable against the guarantor): see the Minors Contracts Act 1987 ss 1, 2; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14.

5 See the Minors Contracts Act 1987 s 3(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 24. See also *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL.

6 See the Trustee Act 1925 s 53; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 71, 74. Section 53 refers to 'infants' which term now has the same definition as 'minor' (see note 1): see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 1-3.

7 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 paras 1, 2; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 31.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(ii) Persons under Disability/B. PERSONS LACKING MENTAL CAPACITY/158. Persons lacking mental capacity.

B. PERSONS LACKING MENTAL CAPACITY

158. Persons lacking mental capacity.

The deed of a person suffering from such mental disorder as to render him incapable of understanding the effect of the deed is void¹. A deed made by such a person during a lucid interval, the nature and effect of which he understood², is binding upon him unless a receiver has been appointed for him³.

Provision is made for the property of mentally disordered persons to be protected by court order or direction⁴. In exceptional circumstances the court may authorise the loan of a patient's money upon mortgage⁵.

1 *Price v Berrington* (1849) 7 Hare 394 at 402.

2 *Towart v Sellars* (1817) 5 Dow 231, HL.

3 See *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284. As to the capacity of mentally disordered persons to execute deeds and to make contracts, and their powers of disposition and the effect of such dispositions generally, see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 595 et seq.

4 See the Mental Capacity Act 2005 Pt 2 (ss 45-61); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 749 et seq.

5 See *Re Ridgeways* (1825) 1 Hog 309.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(ii) Persons under Disability/C. BANKRUPTS/159. Bankrupts.

C. BANKRUPTS

159. Bankrupts.

Dispositions of property made by a bankrupt between the date of presentation of the bankruptcy petition and the date when the property vests in the trustee are void unless approved or ratified by the court¹, although this does not give a remedy against a mortgagee in

respect of any property or payment which he received before the commencement of the bankruptcy in good faith, for value and without notice that the petition has been presented². In the case of land, a petition in bankruptcy does not bind a purchaser³ of a legal estate in good faith for money or money's worth unless for the time being it is registered⁴. Where a petition has been registered, the title of the trustee in bankruptcy is void as against a purchaser of a legal estate in good faith for money or money's worth claiming under a conveyance made after the date of registration, unless at the date of the conveyance either the registration of the petition is in force or a bankruptcy order⁵ on the petition is registered⁶. Where the proprietor of a registered estate or charge⁷ is adjudged bankrupt, the title of his trustee in bankruptcy is void as against a person to whom a registrable disposition⁸ of the estate or charge is made if the disposition is made for valuable consideration⁹, the person to whom the disposition is made acts in good faith¹⁰, and at the time of the disposition no notice or restriction is entered¹¹ in relation to the registered estate or charge¹² and the person to whom the disposition is made has no notice of the bankruptcy petition or the adjudication¹³. When a person is made the subject of a bankruptcy order, his estate¹⁴ vests in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee, and therefore the bankrupt cannot mortgage it¹⁵. However, the title of a trustee in bankruptcy is void as against a purchaser of a legal estate in good faith for money or money's worth unless the bankruptcy order is for the time being registered¹⁶.

A bankrupt mortgagor is not, however, civilly defunct, and may mortgage whatever property is allowed by law, as an exception to the general rule, to remain vested in him¹⁷. Thus a bankrupt may mortgage his expectation of a surplus after payment in full of debts proved in and expenses incurred in relation to his bankruptcy¹⁸. It is not necessary that the bankrupt should mortgage the surplus expressly as such; if he mortgages specific property, and that specific property is more than sufficient to satisfy creditors, the surplus of the property is validly mortgaged¹⁹. A bankrupt may also mortgage property vested in him upon trust²⁰, or immovables situated in a foreign country if the law of the place where the property is situated permits him to do so²¹.

1 See the Insolvency Act 1986 s 284(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217.

2 See the Insolvency Act 1986 s 284(4)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217.

3 A purchaser includes a mortgagee: see the Law of Property Act 1925 s 205(1)(xxi); Land Charges Act 1972 s 17(1); and **SALE OF LAND** vol 42 (Reissue) PARA 55.

4 See the Land Charges Act 1972 s 5(8); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 650. The bankruptcy petition should be registered as a pending action under the Land Charges Act 1972: see s 5(1)(b). Notice of a petition must be given to the Chief Land Registrar, for registration in the register of pending actions: see the Insolvency Rules 1986, SI 1986/1925, rr 6.13, 6.43; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 167, 193. Registration under the Land Charges Act 1972 is deemed to constitute actual notice: see the Law of Property Act 1925 s 198; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 616. Registration of a bankruptcy petition under the Land Charges Act 1972 also triggers registration by the Chief Land Registrar of a notice in respect of the pending action in relation to any registered estate or charge which appears affected: see the Land Registration Act 2002 s 86(2); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 651; **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1014.

5 The Land Charges Act 1972 s 6(6) refers to a 'receiving order', which was the terminology used under the Bankruptcy Act 1914 (repealed): such orders were replaced by bankruptcy orders under the Insolvency Act 1986.

6 See the Land Charges Act 1972 s 6(6); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 650.

7 'Registered charge' means a charge the title to which is entered in the register of title; and 'registered estate' means a legal estate the title to which is entered in the register of title, other than a registered charge: see the Land Registration Act 2002 s 132(1). As to the meaning of 'registered' see PARA 155 note 3; and as to

the meaning of 'charge' see PARA 155 note 5. As to the meaning of 'legal estate' see PARA 105 note 2; definition applied by s 132(1).

8 'Registrable disposition' means a disposition which is required to be completed by registration under the Land Registration Act 2002 s 27 (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 911-914): s 132(1).

9 Land Registration Act 2002 s 86(5)(a). 'Valuable consideration' does not include marriage consideration or a nominal consideration in money: s 132(1).

10 Land Registration Act 2002 s 86(5)(b).

11 Ie under the Land Registration Act 2002 s 86: see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1014.

12 Land Registration Act 2002 s 86(5)(c)(i).

13 Land Registration Act 2002 s 86(5)(c)(ii).

14 Ie all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and any property comprised in his estate or treated as belonging to or being vested in the bankrupt, subject to certain limited exceptions: see the Insolvency Act 1986 s 283(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216. See also *Re Landau (a bankrupt)*, *Pointer v Landau* [1998] Ch 223 at 231, [1997] 3 All ER 322 at 327 per Ferris J.

15 See the Insolvency Act 1986 s 306(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 391. See also *Re Robinson's Settlement*, *Gant v Hobbs* (1911) 28 TLR 121, where a mortgage made after the receiving order, in pursuance of a request made before the receiving order, was upheld (revsd on another point [1912] 1 ChD 717, CA).

16 See the Land Charges Act 1972 s 6(5) (substituted by the Insolvency Act 1985 s 235, Sch 8 para 21); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 658. The official receiver is under a mandatory duty to give notice of a bankruptcy order to the Chief Land Registrar for registration under the Land Charges Act 1972: see the Insolvency Rules 1986, SI 1986/1925, rr 6.34, 6.46; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 198, 204. Registration under the Land Charges Act 1972 is deemed to constitute actual notice: see the Law of Property Act 1925 s 198; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 693. As soon as practicable after the registration of a bankruptcy order under the Land Charges Act 1972, the registrar must, in relation to any registered estate or charge which appears to him to be affected by the order, enter in the register a restriction reflecting the effect of the Insolvency Act 1986: see the Land Registration Act 2002 s 86(4); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 659; **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1014.

17 See the Insolvency Act 1986 s 283(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216. See also *Bird v Philpott* [1900] 1 Ch 822 at 828 per Farwell J.

18 *Re Evelyn, ex p General Public Works and Assets Co Ltd* [1894] 2 QB 302, DC.

19 *Bird v Philpott* [1900] 1 Ch 822 (following *Troup v Ricardo* (1864) 4 De GJ & Sm 489; and distinguishing *Re Austin, ex p Sheffield* (1879) 10 ChD 434, CA, and *Re Leadbitter* (1878) 10 ChD 388, CA). See also *R v Adie, ex p Rushforth* (1901) 84 LT 508.

20 A bankrupt's property divisible among his creditors does not include property held by him on trust for another: see the Insolvency Act 1986 s 283(3)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216. See also *Re Whitehead* (1885) 14 QBD 419, CA.

21 As to the effect of an English bankruptcy order in relation to foreign immovables see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 391; **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 501.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(ii) Persons under Disability/C. BANKRUPTS/160. Property acquired after bankruptcy.

160. Property acquired after bankruptcy.

After-acquired property does not vest automatically in the trustee in bankruptcy, who must claim it from the bankrupt by serving notice on him¹: such property can therefore be effectively

mortgaged by the bankrupt, before the intervention of the trustee in bankruptcy. On service of the trustee's notice of claim, the property vests in the trustee as part of the bankrupt's estate, and the trustee's title relates back to the date of acquisition of the property by the bankrupt². However, no remedy lies against any person who acquires the property in good faith and for value, and without notice of the bankruptcy, whether before or after the service of the notice by the trustee³.

Independently of these provisions, a mortgage by a bankrupt may be effective as against his trustee in two cases, namely where the mortgage is of an equitable chose or thing in action and the trustee has not perfected his title by notice⁴, and where the trustee has stood by and allowed the mortgagee to advance his money upon the supposition that the bankrupt could dispose of the property⁵.

1 See the Insolvency Act 1986 s 307(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 445 et seq.

2 See the Insolvency Act 1986 s 307(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 446.

3 See the Insolvency Act 1986 s 307(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 446. See also PARA 159.

4 *Stuart v Cockerell* (1869) LR 8 Eq 607; *Palmer v Locke* (1881) 18 ChD 381, CA. If, however, the trustee gives notice first, his title prevails: *Re Beall, ex p Official Receiver* [1899] 1 QB 688, following *Mercer v Vans Colina* (1897) 4 Mans 363.

5 *Troughton v Gitley* (1766) Amb 630; *Re Caughey, ex p Ford* (1876) 1 ChD 521 at 528, CA, per Jessel MR. As to the effect of a trustee in bankruptcy standing by see *Re Bourne, ex p Bourne* (1826) 2 Gl & J 137 at 141; *Engelback v Nixon* (1875) LR 10 CP 645; *Re France, ex p Tinker* (1874) 9 Ch App 716; *Re Rawbone's Trust* (1857) 3 K & J 476; *Tucker v Hernaman* (1853) 4 De GM & G 395.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(ii) Persons under Disability/C. BANKRUPTS/161. Mortgage by trustee in bankruptcy.

161. Mortgage by trustee in bankruptcy.

The trustee in bankruptcy has the power to mortgage any part of the property comprised in the bankrupt's estate with the sanction of the creditors' committee¹ or the court for the purpose of raising money for the payment of the bankrupt's debts². The official receiver, while acting as interim receiver between the presentation of the petition and the making of the order or while acting as receiver before the property vests in the trustee in bankruptcy, has no such power to mortgage land³.

1 As to the creditors' committee see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 328 et seq.

2 See the Insolvency Act 1986 s 314(1)(a), Sch 5 para 4; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 460. A mortgage by a trustee in bankruptcy should both relieve him of personal liability and provide that he is not to be bound personally to do anything in contravention of the insolvency legislation. As to a liquidator's power to mortgage a company's assets see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 577.

3 See the Insolvency Act 1986 s 287(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 234.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(iii) Partners/162. Partner's power to mortgage otherwise than by deed.

(iii) Partners

162. Partner's power to mortgage otherwise than by deed.

A partner¹ has an implied authority to pledge or mortgage, otherwise than by deed, the personal property belonging to the partnership, and probably also the real estate² if dealing in it is one of the objectives of the partnership, in order to raise money for the carrying on in the usual way of the partnership business, unless the partner so pledging or mortgaging has in fact no authority so to act for the firm, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner³. A partner cannot validly mortgage partnership property, known to be such by the mortgagee, to secure his personal debt, without the knowledge and consent of the other partners⁴, and the burden of proving that consent rests on the mortgagee⁵. Where the mortgagee does not know that the property mortgaged is partnership property, the mortgage is good⁶.

This authority to mortgage the partnership property continues after dissolution so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of dissolution⁷; but a bankrupt partner is deprived of that authority⁸.

1 A limited partner under the Limited Partnerships Act 1907 has no power to bind the firm: see s 6(1); and **PARTNERSHIP** vol 79 (2008) PARA 226. As to the meanings of 'limited partner' and 'general partner' see **PARTNERSHIP** vol 79 (2008) PARA 219.

2 Partnership land is held on trust: see PARA 163.

3 See the Partnership Act 1890 s 5; and **PARTNERSHIP** vol 79 (2008) PARA 45 et seq. See also *Butchart v Dresser* (1853) 4 De GM & G 542 (equitable mortgage of shares); *Re Ogden, ex p Lloyd* (1834) 1 Mont & A 494 (equitable mortgage of trade fixtures); *Re Litherland, ex p Howden* (1842) 2 Mont D & De G 574 (mortgage of a ship). However, one partner cannot mortgage the whole of the future profits of a voyage in the shape of unearned freight: *Guion v Trask* (1860) 1 De GF & J 373. For the effect of a mortgage by a partner of his own share in the partnership see PARA 166.

4 *Shirreff v Wilks* (1800) 1 East 48; *Wilkinson v Eykyn* (1866) 14 WR 470 (following *Young v Keighly* (1808) 15 Ves 557 and *Allen v Kilbre* (1819) 4 Madd 464); *Cavander v Bulteel* (1873) 9 Ch App 79. See also *Ridley v Taylor* (1810) 13 East 175 at 182 per Lord Ellenborough.

5 *Snaith v Burridge* (1812) 4 Taunt 684; *Re Wardley and Hodson, ex p Thorpe* (1836) 2 Deac 16; *Frankland v M'Gusty* (1830) 1 Knapp 274, PC; *Leverson v Lane* (1862) 13 CBNS 278.

6 *Reid v Hollinshead* (1825) 4 B & C 867 (following *Raba v Ryland* (1819) Gow 132 and *Tupper v Haythorne* (1815) Gow 135n).

7 See the Partnership Act 1890 s 38; and **PARTNERSHIP** vol 79 (2008) PARAS 52, 198. See also *Butchart v Dresser* (1853) 4 De GM & G 542; *Re Clough, Bradford Commercial Banking Co v Cure* (1885) 31 ChD 324; *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA (following *Re Langmead's Trusts* (1855) 20 Beav 20 (affd 7 De GM & G 353) and *Re Ryan* (1868) 3 IR Eq 222).

8 See the Partnership Act 1890 s 38; and **PARTNERSHIP** vol 79 (2008) PARA 52.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(iii) Partners/163. Mortgages by deed.

163. Mortgages by deed.

Neither during the continuance of the partnership nor after its dissolution can one partner by executing a mortgage deed of partnership property bind the other partners¹ unless special authority is given him to do so². The common law requires that the authority must be contained in a deed; and it is not enough, either at law or in equity, that the agreement constituting the partnership is under seal unless it contains a particular authority to the partners to execute deeds on behalf of the firm³. Where a partner executes a mortgage deed on behalf of the firm, the partner may be bound even though the firm is not bound⁴, unless he shows that his signature was conditional on the firm being bound⁵. If a partner executes a deed for himself and his partner in the presence and by the authority of his partner, the execution operates as an execution by both⁶; and even though a mortgage deed, executed by one partner alone, is not at law binding on the firm, it may be a good security in equity⁷. Partnership land is normally held by one or two partners as trustees⁸.

1 *Harrison v Jackson* (1797) 7 Term Rep 207; *Steiglitz v Egginton* (1815) Holt NP 141. See also *Hawkshaw v Parkins* (1819) 2 Swan 539, where a distinction is suggested between a deed of release and a deed of grant; cf however *Juggeewundas Keeka Shah v Ramdas Brijbookundas* (1841) 2 Moo Ind App 487, PC.

2 *Steiglitz v Egginton* (1815) Holt NP 141.

3 *Harrison v Jackson* (1797) 7 Term Rep 207 at 210 per Lord Kenyon CJ.

4 *Elliot v Davis* (1800) 2 Bos & P 338. See also *Hawkshaw v Parkins* (1819) 2 Swan 539; *Cumberlege v Lawson* (1857) 1 CBNS 709.

5 *Cumberlege v Lawson* (1857) 1 CBNS 709. See also *Antram v Chace* (1812) 15 East 209; *Brownrigg v Rae* (1850) 5 Exch 489; *Gordon v Ellis* (1844) 7 Man & G 607; *Hawker v Hallewell* (1856) 3 Sm & G 194.

6 *Ball v Dunsterville* (1791) 4 Term Rep 313; approved in *Burn v Burn* (1798) 3 Ves 573 at 578 per Lord Loughborough LC. See also *Brutton v Burton and Mills* (1819) 1 Chit 707 at 709.

7 *Re Boyd, Re Wilson and Vause, ex p Bosanquet* (1847) De G 432.

8 As to the powers of trustees see PARA 175 et seq. As to the effect of a change in a firm after the partnership has mortgaged property see PARA 164. Partnership land is held on a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(iii) Partners/164. Effect of change in partnership.

164. Effect of change in partnership.

Where a partnership mortgages property, the mortgage prima facie only secures advances made before any subsequent alteration in the partnership, whether by the retirement or the admission of a partner or partners or by both¹. If, however, the mortgage was not made by deed², its scope may be enlarged or restricted, after an alteration in the partnership, by an oral agreement with the creditor, whether express or implied³.

Although a mortgage made by deed cannot be varied by an oral agreement, such an agreement may apparently create an equitable mortgage by or to the new partnership subject to the prior legal mortgage by deed⁴.

A mortgage of land can no longer⁵ be created orally, and a validly created equitable mortgage of land cannot be varied orally⁶.

- 1 *Ex p Kensington* (1813) 2 Ves & B 79 at 83 per Lord Eldon. Whether it extends to any advances made after alterations in the partnership depends on the terms of the mortgage.
- 2 *Re Hopkins, ex p Hooper* (1815) 2 Rose 328; *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL.
- 3 *Ex p Kensington* (1813) 2 Ves & B 79; *Re Ablett, ex p Lloyd* (1824) 1 Gl & J 389; *Re Worters, ex p Oakes* (1841) 2 Mont D & De G 234; *Re Lendon, ex p Lane* (1846) De G 300. See also *Re Burkill, ex p Nettleship* (1841) 2 Mont D & De G 124.
- 4 *Re Borron, ex p Parr* (1835) 4 Deac & Ch 426.
- 5 le since 27 September 1989.
- 6 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and PARA 118.

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165. Partner's power to lend on mortgage.

A partner has authority to lend the firm's money on mortgage, when such a transaction is part of the ordinary business of the firm¹; but a partner has, as a rule, no authority to take as security any property to which a liability is attached, such as partly paid shares in a company².

- 1 *Re Land Credit Co of Ireland, Weikersheim's Case* (1873) 8 Ch App 831.
- 2 See *Niemann v Niemann* (1889) 43 ChD 198, CA; and cf *Re Land Credit Co of Ireland, Weikersheim's Case* (1873) 8 Ch App 831.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(1) ABSOLUTE OWNERS OF PROPERTY/(iii) Partners/166. Mortgage of share in partnership.

166. Mortgage of share in partnership.

If a partner mortgages his own share in a partnership¹, the mortgagee takes subject to equities subsisting between the partners².

An assignee of a share in a partnership is not, however, bound by a subsequent agreement between the assignor and another of the partners for the sale to that other partner of that share, even though that agreement is made in good faith³. A mortgage of a share in a partnership is not a mortgage of chattels but of a chose or thing in action, and need not be registered as a bill of sale⁴.

A mortgagee of a partner's share is not entitled during the continuance of the partnership to interfere in the management, or to require accounts, or to inspect the books of the partnership business⁵. He is entitled to an inquiry as to the value of the share at the date when he took proceedings to realise his mortgage; but, if a dissolution of the partnership has previously taken place, the date of dissolution is that date at which the necessary account ought to be taken⁶. He may enforce his security by a claim for an account and foreclosure⁷. Where the mortgage is by deed, but not under a bill of sale⁸, he has probably a power of sale⁹ and a power to appoint a receiver¹⁰.

1 As to a partner's power to mortgage the partnership property as distinct from his own share in the partnership see PARAS 162-163.

2 *Smith v Parkes* (1852) 16 Beav 115; *Kelly v Hutton* (1868) 3 Ch App 703; *Re Garwood's Trusts, Garwood v Paynter* [1903] 1 Ch 236. See also *Whetham v Davey* (1885) 30 ChD 574; the Partnership Act 1890 s 31; and **PARTNERSHIP** vol 79 (2008) PARA 126.

3 *Watts v Driscoll* [1901] 1 Ch 294, CA (distinguishing *Kelly v Hutton* (1868) 3 Ch App 703 and *Whetham v Davey* (1885) 30 ChD 574).

4 *Re Bainbridge, ex p Fletcher* (1878) 8 ChD 218. As to legal mortgages of choses or things in action see PARA 232. As to the registration of bills of sale see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1754-1755.

5 See the Partnership Act 1890 s 31(1); and **PARTNERSHIP** vol 79 (2008) PARA 126.

6 *Whetham v Davey* (1885) 30 ChD 574.

7 *Whetham v Davey* (1885) 30 ChD 574; *Redmayne v Forster* (1886) LR 2 Eq 467; and see **PARTNERSHIP** vol 79 (2008) PARA 126. See also *Bentley v Bates* (1840) 4 Y & C Ex 182. As to a claim for an account see **PARTNERSHIP** vol 79 (2008) PARA 150 et seq. The mortgagee's claim for an account will not be stayed because of an arbitration clause in the partnership deed, at any rate where that clause does not embrace persons claiming through the partners: *Bonnin v Neame* [1910] 1 Ch 732. As to foreclosure see PARA 566 et seq.

8 *Calvert v Thomas* (1887) 19 QBD 204, CA (decided under the Conveyancing Act 1881 s 19 (repealed)). See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1786.

9 See the Law of Property Act 1925 s 101; and PARA 443.

10 See the Law of Property Act 1925 s 101; and PARA 476.

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(2) LIMITED OWNERS OF PROPERTY

(i) In general

167. No new strict settlements.

No settlement created after 1 January 1997¹ is a settlement for the purposes of the Settled Land Act 1925 and no settlement is deemed to be made under that Act after that date². Where a person purports by an instrument coming into operation after 1 January 1997 to grant an entailed interest in real or personal property, the instrument is not effective to grant an entailed interest³.

1 I.e. the date on which the Trusts of Land and Appointment of Trustees Act 1996 was brought into force by the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974.

2 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(1); and **SETTLEMENTS** vol 42 (Reissue) PARA 675. Strict settlements in existence on 1 January 1997 continue to exist until there is no relevant property (heirlooms, i.e. land and personal chattels to which the Settled Land Act 1925 s 67(1) (see **SETTLEMENTS** vol 42 (Reissue) PARA 941) applies): Trusts of Land and Appointment of Trustees Act 1996 s 2(4).

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5(1)(a). The instrument operates instead as a declaration that the property is held in trust absolutely for the person to whom an

entailed interest in the property was purportedly granted: Sch 1 para 5(1)(b). See **SETTLEMENTS** vol 42 (Reissue) PARA 677.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(2) LIMITED OWNERS OF PROPERTY/(ii) Tenants for Life and Statutory Owners/168. General statutory power to mortgage.

(ii) Tenants for Life and Statutory Owners

168. General statutory power to mortgage.

Every person who is a tenant for life¹ has powers of executing legal mortgages of the settled land for certain purposes². Where there is no tenant for life, or during the minority of the tenant for life, the trustees of the settlement may exercise the statutory powers³. The tenant for life is given powers to shift incumbrances⁴ and to vary the provisions of an incumbrance and to charge by way of additional security⁵. The statutory power to mortgage is not capable of restriction⁶. Notice of intention to mortgage must be given to the trustees of the settlement and to their solicitor⁷. The mortgage must be by demise or legal charge⁸, and will override all the limitations, powers and provisions of the settlement⁹, but will be subject to prior legal estates or interests¹⁰. In the exercise of his statutory powers the limited owner must have regard to the interests of, and is in the position of a trustee for, all persons entitled under the settlement¹¹.

1 le within the meaning of the Settled Land Act 1925, under which a 'tenant for life' includes a person not being a statutory owner who has the powers of a tenant for life: see ss 19, 117(1)(xxviii); and **SETTLEMENTS** vol 42 (Reissue) PARA 761. As to tenants in tail see PARAS 170-172.

2 The purposes for which the power may be exercised include the discharging of incumbrances and the making of certain improvements to the land or the title to it, and are specified in the Settled Land Act 1925 s 71, as extended by other enactments: see **SETTLEMENTS** vol 42 (Reissue) PARA 849. As to mortgages for the payment of costs out of settled property see s 114(e); and **SETTLEMENTS** vol 42 (Reissue) PARA 824. Where a tenant for life executes a mortgage as absolute owner in favour of a mortgagee acting in good faith, the mortgage may be valid by virtue of s 110(1) (see **SETTLEMENTS** vol 42 (Reissue) PARA 885): see *Re Morgan's Lease, Jones v Norsesowicz* [1972] Ch 1, [1971] 2 All ER 235; cf *Weston v Henshaw* [1950] Ch 510.

3 See the Settled Land Act 1925 ss 23, 26, 117(1)(xxvi). See also **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 33, 56 (minority of tenant for life); **SETTLEMENTS** vol 42 (Reissue) PARA 766 (no tenant).

4 See the Settled Land Act 1925 s 69; and **SETTLEMENTS** vol 42 (Reissue) PARA 851. Cf *Re Earl of Stafford and Maples* [1896] 1 Ch 235, CA.

5 See the Settled Land Act 1925 s 70; and **SETTLEMENTS** vol 42 (Reissue) PARA 855.

6 See the Settled Land Act 1925 ss 104(1), (2), 106; and **SETTLEMENTS** vol 42 (Reissue) PARAS 777, 782. Cf *Re Hazle's Settled Estates* (1885) 29 ChD 78, CA; *Re Atkinson, Atkinson v Bruce* (1886) 31 ChD 577, CA.

7 See the Settled Land Act 1925 s 101(1); and **SETTLEMENTS** vol 42 (Reissue) PARA 783. See also *Re Ray's Settled Estates* (1884) 25 ChD 464; *Duke of Marlborough v Sartoris* (1886) 32 ChD 616.

8 See the Settled Land Act 1925 s 72(1); and **SETTLEMENTS** vol 42 (Reissue) PARA 874.

9 See the Settled Land Act 1925 s 72(2); *Re Keck and Hart's Contract* [1898] 1 Ch 617; and **SETTLEMENTS** vol 42 (Reissue) PARA 874.

10 See the Settled Land Act 1925 s 72(2); and **SETTLEMENTS** vol 42 (Reissue) PARA 874. See also *Re Sebright's Settled Estates* (1886) 33 ChD 429 at 438; *Cardigan v Curzon-Howe* (1888) 40 ChD 338 (affd (1889) 41 ChD 375, CA); *Re Du Cane and Nettlefold's Contract* [1898] 2 Ch 96; *Re Mundy and Roper's Contract* [1899] 1 Ch 275, CA; *Re Dickin and Kelsall's Contract* [1908] 1 Ch 213; *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA.

11 See the Settled Land Act 1925 s 107(1); and **SETTLEMENTS** vol 42 (Reissue) PARA 775. This provision does not affect the title of the estate mortgaged by a tenant for life, but it affects the tenant for life personally with liability as a trustee: *Re Marquis of Ailesbury's Settled Estates* [1892] 1 Ch 506 at 535-536, CA. Mortgages by tenants for life normally contain a provision restricting the personal liability of the tenant for life to repay the money borrowed: see PARA 179. As to the statutory power of limited owners to mortgage settled land see further **SETTLEMENTS** vol 42 (Reissue) PARAS 849-850. As to the mortgage by a tenant for life of his equitable life interest see PARA 189.

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169. Limited owners with express powers to mortgage.

Express power to mortgage may be conferred on the trustees of a settlement, or on a limited owner under the settlement, if it is considered that the statutory powers¹ do not go far enough². In order to prevent conflict between the powers of the limited owner and the trustees, it is, however, provided that any power conferred on the trustees must in general be exercisable by the limited owner as if it were an additional power conferred on him and not otherwise³, and must be exercisable in the same manner and with the same effect as his statutory powers⁴.

1 See PARA 168.

2 See the Settled Land Act 1925 s 109(1); and **SETTLEMENTS** vol 42 (Reissue) PARA 880.

3 See the Settled Land Act 1925 s 108(2); and **SETTLEMENTS** vol 42 (Reissue) PARA 881.

4 See the Settled Land Act 1925 s 109(2); and **SETTLEMENTS** vol 42 (Reissue) PARA 880.

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(iii) Tenants in Tail

170. Power of tenant in tail to mortgage.

A tenant in tail can as such have only an equitable interest in the land entailed¹, but if he is tenant in tail in possession he will normally have the legal estate of freehold, or the legal term in leaseholds, vested in him as estate owner on the trusts of the settlement². The tenant in tail then has the statutory power of mortgaging of a tenant for life³. However, the tenant in tail differs from other limited owners in that he possesses special statutory powers of disposing of the land entailed for an equitable interest in fee simple or any less interest⁴ which are distinct from the general powers of disposition conferred upon limited owners⁵. If the settlement will not be continued by the subsistence of family charges⁶, the tenant in tail can put an end to it by barring his estate tail⁷ and then, by virtue of his legal estate, he becomes the absolute owner in equity and can mortgage as such. Unless the legal estate in the land entailed is vested in the tenant in tail, any mortgage by him can affect only the equitable interest in the land⁸. By virtue of his special statutory power of disposition he may execute by deed a mortgage in the form of a conveyance of the equitable interest in fee simple⁹ or any less interest in the land¹⁰; but in the case of a tenant in tail who is not in possession, the mortgage, unless executed with the consent of the protector of the settlement¹¹, will convey to the mortgagee only an equitable

interest in the nature of a base fee, which is unimpeachable during the survival of the issue of the tenant in tail, but is voidable upon the death of the survivor of that issue by any person next entitled in remainder on the estate tail¹².

1 See the Law of Property Act 1925 s 1(1), (3); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 46. As to entailed interests generally see **REAL PROPERTY** vol 39(2) (Reissue) PARA 117 et seq.

2 See the Settled Land Act 1925 ss 4(2), 6(b), 7(1)-(4), 9(2), 20(1)(i), 117(1)(xxviii); and **SETTLEMENTS** vol 42 (Reissue) PARAS 689, 696-698, 762.

3 As to a tenant for life's statutory powers of mortgaging see PARA 168. 'Tenant for life' for this purpose includes any tenant in tail in possession other than certain tenants restrained from barring the entail: see the Settled Land Act 1925 ss 20(1)(i), (2), 117(1)(xxviii); and **SETTLEMENTS** vol 42 (Reissue) PARA 762.

4 See the Fines and Recoveries Act 1833 s 15; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 123. The Fines and Recoveries Act 1833 remains in force only in regard to dealings with equitable interests: see the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 4.

5 See by the Settled Land Act 1925 Pt II (ss 38-72): see **SETTLEMENTS** vol 42 (Reissue) PARA 827 et seq.

6 As to the effect of family charges in constituting a settlement see the Settled Land Act 1925 s 1(1)(v); and **SETTLEMENTS** vol 42 (Reissue) PARA 678. As to the power of a person beneficially entitled to land subject only to family charges to convey or create a legal estate subject to the charges see the Law of Property (Amendment) Act 1926 s 1; and **SETTLEMENTS** vol 42 (Reissue) PARA 703.

7 As to the general power of a tenant in tail to bar the entail see the Fines and Recoveries Act 1833 s 15; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 123. For estates tail which cannot be barred see ss 18, 20; and **REAL PROPERTY** vol 39(2) (Reissue) PARAS 132-133. For the necessity for the consent of the protector of the settlement to enable a tenant in tail in remainder to create a larger estate than a base fee see s 34; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 128. As to the protector of the settlement see note 11.

8 See the Law of Property (Amendment) Act 1924 Sch 9 para 4, by which the Fines and Recoveries Act 1833 remains in force only as regards dealings with entailed interests as equitable interests; and note 4.

9 As the mortgage is of an equitable interest, the statutory provision which requires a legal mortgage of the legal estate in land to be by demise or legal charge (see PARA 190) will not apply.

10 See the Fines and Recoveries Act 1833 ss 15, 40; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 123 et seq. As to the cases in which the powers of disposition conferred by the Fines and Recoveries Act 1833 cannot be exercised see ss 18, 20; note 7; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 132. The necessity for the enrolment of dispositions under the Fines and Recoveries Act 1833 was abolished by the Law of Property Act 1925 s 133 (repealed). As to the operation of the former law as to enrolment see *Re Pier's Estate, ex p Browne* (1863) 14 I Ch R 452; cf *Whitmore-Searle v Whitmore-Searle* [1907] 2 Ch 332.

11 As to the circumstances in which a protector of the settlement exists and the person who is protector see the Fines and Recoveries Act 1833 ss 22, 23, 25-28, 32; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 124.

12 See the Fines and Recoveries Act 1833 s 34; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 135. As to the enlargement of an equitable base fee see ss 19, 35, 39; and **REAL PROPERTY** vol 39(2) (Reissue) PARAS 136-137. Formerly, if a tenant in tail in remainder executed a mortgage which was not duly enrolled (see note 10) and therefore did not take effect under the Fines and Recoveries Act 1833, it created an estate which was unimpeachable during the life of the mortgagor but voidable by the entry of the issue in tail: *Hankey v Martin* (1883) 49 LT 560, following *Case of Fines* (1602) 3 Co Rep 84a. See also *Doe d Daniel v Woodroffe* (1849) 2 HL Cas 811; *Machil v Clerk* (1702) Holt KB 615.

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171. Extent of disentailment by mortgage.

Where a tenant in tail mortgages the land entailed under his special statutory powers¹, the entail is in general wholly barred in equity to the extent of the interest created by the mortgage, despite any intention to the contrary expressed or implied in the mortgage deed²; but, if the mortgage only creates an interest pour autre vie or a term of years or a charge unsecured by a term of years or greater interest, the entail is barred only so far as is necessary to give effect to the mortgage, notwithstanding any intention to the contrary expressed or implied³.

1 le under the Fines and Recoveries Act 1833 s 15: see PARA 170.

2 See the Fines and Recoveries Act 1833 s 21; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 131. For the principle that the Fines and Recoveries Act 1833 now operates only in equity see PARA 170. In relation to mortgages by tenants in tail s 21 abrogated, subject to exceptions (see the text to note 3), the presumption that a mortgage is not intended to affect the title to the land subject to the mortgage: *Plomley v Felton* (1888) 14 App Cas 61, PC. Although the statutory provision applies despite any contrary intention indicated in the mortgage, the proviso for redemption may be so proved as to recreate the trusts of the original settlement: *Re Oxenden's Settled Estates, Oxenden v Chapman* (1904) 74 LJCh 234.

3 See the Fines and Recoveries Act 1833 s 21; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 131. This proviso has been used so as to create a mortgage of the estate tail of a person of unsound mind without interfering further than was necessary with the remaindermen: see *Re Pares* (1876) 2 ChD 61. See also *Re Pares, Lillingston v Pares* (1879) 12 ChD 333.

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172. Agreement to disentail.

It seems that, despite certain statutory provisions which enact that a disposition by a tenant in tail resting only in contract is to be of no force and that the courts are not to give effect to defective dispositions¹, an agreement by a tenant in tail to disentail for the purpose of executing a legal mortgage may be specifically enforced against the tenant in tail himself², but not against the issue in tail if the tenant in tail dies before conveying³, unless the remainderman was a party to the mortgage transaction⁴.

1 See the Fines and Recoveries Act 1833 ss 40, 47; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 125.

2 *Bankes v Small* (1887) 36 ChD 716, CA. See also *Lewis v Duncombe* (1855) 20 Beav 398. Cf *Davis v Tollemache* (1856) 2 Jur NS 1181, where the court refused to compel a bankrupt tenant in tail who had merely covenanted in the mortgage deed for further assurance to execute a disentailing deed.

3 See *A-G v Day* (1749) 1 Ves Sen 218 at 224; *Hinton v Hinton* (1755) 2 Ves Sen 631 at 634.

4 See *Pryce v Bury* (1853) 2 Drew 41. See further **REAL PROPERTY** vol 39(2) (Reissue) PARA 125.

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(3) FIDUCIARY OWNERS

(i) Personal Representatives

173. Power of personal representatives to mortgage.

Personal representatives have always had power to mortgage the deceased's personal estate¹: in dealing with personal estate, personal representatives have, for purposes of administration or during the minority of any beneficiary or the subsistence of any life interest or until the period of distribution arrives, the same power to raise money by mortgage or charge, whether or not by the deposit of documents, as a personal representative formerly had with respect to personal estate². In respect of real estate, personal representatives have most of the functions and powers of trustees, with appropriate modifications³. A legal mortgage granted by a personal representative will not be invalidated only because the mortgagee may have notice that all the debts, liabilities, funeral and testamentary or administration duties and legacies of the deceased have been discharged or provided for⁴.

1 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 440.

2 See the Administration of Estates Act 1925 s 39(1)(i) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), (2), Sch 3 para 6(2)(a), Sch 4); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 440. This applies in relation to the estate of a person who died since 1 January 1997 (ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 was brought into force by the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974); before that date personal representatives had the powers of trustees for sale, but the Trusts of Land and Appointment of Trustees Act 1996 has replaced trusts for sale of land with trusts of land (see s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66; **SETTLEMENTS** vol 42 (Reissue) PARA 609; **TRUSTS** vol 48 (2007 Reissue) PARAS 605, 724). As to the powers of personal representatives see the Administration of Estates Act 1925 ss 2(1), 40, 48(2); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 441. As to the powers of trustees to mortgage see PARA 175 et seq.

3 See the Administration of Estates Act 1925 s 39(1)(ii) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 6(2)(b)). This applies in relation to the estate of a person who died since 1 January 1997: see note 2. As to the functions and powers of trustees see the Trusts of Land and Appointment of Trustees Act 1996 Pt I (ss 1-18); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 64 et seq. However s 10 (consents), s 11 (consultation) and s 14 (application for order) do not apply to personal representatives: see s 18.

4 See the Administration of Estates Act 1925 s 36(8); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 445.

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174. Necessity for all personal representatives to join in mortgage.

If probate is granted to one or some of two or more persons named as executors, a mortgage of real estate¹ may be made by the proving executor or executors and is as effectual as if all the persons named as executors had concurred therein², but otherwise neither a legal nor an equitable mortgage of real estate can be made without the concurrence of all the personal representatives or a court order³.

1 'Real estate' for this purpose includes chattels real: see the Administration of Estates Act 1925 s 3(1)(i).

2 See the Administration of Estates Act 1925 s 2(2); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 443. See also *Fountain Forestry Ltd v Edwards* [1975] Ch 1, [1974] 2 All ER 280.

3 See the Administration of Estates Act 1925 s 2(2); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 443.

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(ii) Trustees

175. Trustee's power to mortgage.

A trustee may not mortgage the trust property¹ save in pursuance of a power to do so expressly or impliedly conferred upon him by the instrument creating the trust², or in pursuance of a power conferred by statute³, or in pursuance of a court order⁴. A power to mortgage will be implied from a power of sale if the power of sale is given for the purpose of raising a particular charge, but not if the testator's object is to effect an absolute conversion of his estate⁵.

1 As to a trustee's equitable lien for expenditure on trust property see **LIEN** vol 68 (2008) PARA 803; **TRUSTS** vol 48 (2007 Reissue) PARA 905.

2 *Re Bellinger, Durrell v Bellinger* [1898] 2 Ch 534 (implied powers); *Re Suenson-Taylor's Settlement, Moores v Moores* [1974] 3 All ER 397, [1974] 1 WLR 1280. As to charity trustees see PARA 185.

3 See PARAS 176-177.

4 For the court's power to authorise a mortgage by trustees see the Trustee Act 1925 s 57 (which does not extend to trustees of settled land: see s 57(4)); and **TRUSTS** vol 48 (2007 Reissue) PARA 1061. For the corresponding provision in relation to settled land see the Settled Land Act 1925 s 64; and **SETTLEMENTS** vol 42 (Reissue) PARA 671.

5 *Stroughill v Anstey* (1852) 1 De GM & G 635 (following *Haldenby v Spofforth* (1839) 1 Beav 390; and explaining *Ball v Harris* (1839) 4 My & Cr 264); *Page v Cooper* (1853) 16 Beav 396; *Devaynes v Robinson* (1857) 24 Beav 86. It seems that in *Ball v Harris*, Lord Cottenham LC, and in *Mills v Banks* (1724) 3 P Wms 1 at 9, Lord Macclesfield LC, stated the law in terms which were too wide. See also *Bennett v Wyndham* (1857) 23 Beav 521, where a prohibition against raising a charge by sale was held to be also a prohibition against raising that charge by mortgage.

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176. Statutory power to mortgage land.

In general¹, trustees of land² have in relation to the land subject to the trust the powers of an absolute owner³, which include the power to mortgage, save in so far as provision to the effect that they do not apply is made by the disposition creating the trust⁴. Such powers may not be exercised in contravention of any enactment or any rule of law or equity, or any order made in pursuance of any such enactment or rule⁵. If the disposition creating such a trust makes provision requiring any consent to be obtained to the exercise of the trustees' power, the power may not be exercised without that consent⁶. The trustees are required to consult the beneficiaries who are of full age and beneficially entitled to an interest in possession in the land and, so far as consistent with the general interest of the trust, give effect to the wishes of those beneficiaries or the majority of them⁷.

1 These provisions apply in relation to all trusts of land since 1 January 1997 (ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 was brought into force by the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974), except in relation to a trust created by a will if the testator died before that date, and save in relation to the personal representatives of a person who died before then: see the Trusts of Land and Appointment of Trustees Act 1996 ss 3(2), 18(3), 25(2), (5), Sch 4. The Trusts of Land and Appointment of Trustees Act 1996 is stated not to apply to land which is settled land under the Settled Land Act 1925 (see **SETTLEMENTS** vol 42 (Reissue) PARA 675 et seq) and land to which the Universities and Colleges Estates Act 1925 (see **EDUCATION** vol 15(2) (2006 Reissue) PARA 1379) applies: see the Trusts of Land and Appointment of Trustees Act 1996 s 1(3); and PARA 177.

2 'Trustees of land' means trustees of a trust of land; and a 'trust of land' means (subject to the Trusts of Land and Appointment of Trustees Act 1996 s 1(3): see note 1) any trust of property which consists of or includes land: s 1(1). The reference to a trust is a reference to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and includes a trust created, or arising, before 1 January 1997 (see note 1): s 1(2). These definitions apply in any Act unless the contrary intention appears: see the Interpretation Act 1978 s 5, Sch 1 (definitions added by the Trusts of Land and Appointment of Trustees Act 1996, s 25(4), Sch 3, para 16).

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and **TRUSTS** vol 48 (2007 Reissue) PARA 1035.

4 See the Trusts of Land and Appointment of Trustees Act 1996 s 8(1); and **TRUSTS** vol 48 (2007 Reissue) PARA 1035. The right to exclude or restrict the powers of the trustees does not apply in the case of charitable, ecclesiastical or public trusts and is in all cases subject to any enactment which prohibits or restricts such a provision: s 8(3), (4).

5 See the Trusts of Land and Appointment of Trustees Act 1996 s 6(6); and **TRUSTS** vol 48 (2007 Reissue) PARA 1035.

6 See the Trusts of Land and Appointment of Trustees Act 1996 s 8(2); and **TRUSTS** vol 48 (2007 Reissue) PARA 1046. A provision requiring consent takes effect subject to any enactment which prohibits or restricts it: s 8(4).

7 See the Trusts of Land and Appointment of Trustees Act 1996 s 11(1); and **TRUSTS** vol 48 (2007 Reissue) PARA 1036. The obligation to consult can be excluded (see s 11(2)(a)) and does not apply in relation to a trust created or arising under a will made before 1 January 1997 or a trust created before then unless provision to the effect that it is to apply is made by deed (see s 11(2)(b), (3)).

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177. Statutory powers in other cases.

In the case of trusts to which the Trusts of Land and Appointment of Trustees Act 1996 does not apply¹, where trustees are authorised by the instrument, if any, creating the trust, or by law, to pay or apply capital money subject to the trust for any purpose or in any manner, they have power to raise the money by mortgage of all or any part of the trust property for the time being in possession². This power is available notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes, or to trustees of settled land, not also being the statutory owners³.

1 As to the trusts of land to which the Trusts of Land and Appointment of Trustees Act 1996 does not apply see PARA 176 note 1.

2 See the Trustee Act 1925 s 16(1); and **TRUSTS** vol 48 (2007 Reissue) PARA 1055. The statutory power does not permit the mortgaging of the trust fund to raise money for the purchase of further investments: *Re Suenson-Taylor's Settlement, Moores v Moores* [1974] 3 All ER 397, [1974] 1 WLR 1280.

3 See the Trustee Act 1925 s 16(2); and **TRUSTS** vol 48 (2007 Reissue) PARA 1055. The power is available whether the trust was constituted or created before or after 1 January 1926 (ie the date on which the Trustee

Act 1925 was brought into force by virtue of s 71(2) (repealed)): see s 69(1). Trustees of land formerly had, in relation to land, all the powers of a tenant for life (see PARA 168) and the trustees of a settlement under the Settled Land Act 1925 (see **SETTLEMENTS** vol 42 (Reissue) PARAS 902-905): see the Law of Property Act 1925 s 28(1) (repealed with savings). As to the similar power of charity trustees see PARA 185.

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178. Protection of mortgagee.

A mortgagee advancing money on a mortgage purporting to be made under any trust or power vested in trustees is not concerned to see that the money is wanted, or that no more than is wanted is raised, or otherwise as to its application¹ or to see that the trustees have consulted the beneficiaries and given effect to the wishes of the majority of them². A mortgagee of unregistered land may be similarly unconcerned as to beneficiaries' rights³, and such a mortgage is not invalidated by any exclusion, limitation or restriction of the trustees' powers unless the mortgagee has actual notice thereof⁴; and a mortgagee of registered land is unaffected by any relevant limitations, since for the purpose of preventing the title of a disponee being questioned⁵, a person's right to exercise owner's powers⁶ in relation to a registered estate or charge⁷ is free from any limitation⁸ affecting the validity of a disposition⁹. Where a disposition creating a trust of land requires the consent of more than two persons to the grant of a mortgage, the consent of any two of them is sufficient in favour of a mortgagee, and the consent of a minor is not required in favour of a purchaser¹⁰. A mortgage of a legal estate for money or money's worth will overreach the interests of the beneficiaries under the trust if the mortgage is made by trustees of land and so long as any capital monies are advanced to not fewer than two trustees (except where the trustee is a trust corporation)¹¹ even if the beneficiary is in actual occupation of the land¹² or the claim to a beneficial interest is based on proprietary estoppel¹³.

1 See the Trustee Act 1925 s 17; and **TRUSTS** vol 48 (2007 Reissue) PARA 1055.

2 Trusts of Land and Appointment of Trustees Act 1996 s 16(1). As to the trustees' duty to consult with beneficiaries, to have regard to their rights, and to obtain their consent, see ss 6(5), 7(3), 11(1); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 223; **TRUSTS** vol 48 (2007 Reissue) PARAS 1035-1036.

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 16(1). Section 16 applies to all mortgagees of unregistered land pursuant to a mortgage granted since 1 January 1997 (ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 was brought into force by the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974): see the Trusts of Land and Appointment of Trustees Act 1996 ss 16(7), 27(2).

4 See the Trusts of Land and Appointment of Trustees Act 1996 s 16(2). See also note 3. As to the exercise of the trustees' powers in this regard see ss 6(6), (8), 8; and **TRUSTS** vol 48 (2007 Reissue) PARA 1035.

5 The Land Registration Act 2002 s 26 (see the text to notes 6-9) is enacted only for this purpose, and accordingly does not affect the lawfulness of a disposition: s 26(3).

6 As to owner's powers see the Land Registration Act 2002 s 23; PARA 155; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906.

7 As to the meanings of 'registered estate' and 'registered charge' see PARA 159 note 7.

8 Ie any limitation other than a limitation reflected by an entry in the register (Land Registration Act 2002 s 26(2)(a)) or imposed by or under the legislation relating to the registration of land (s 26(2)(b)). Such limitations include, for example, limitations on dealing protected by a caution, inhibition or restriction entered under the Land Registration Act 1925: see the Land Registration Act 2002 s 134, Sch 12 paras 1, 2; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 993 et seq.

9 See the Land Registration Act 2002 s 26(1); PARA 202; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 909. This has been the case since 13 October 2003 (ie the date on which s 26 was brought into force by the Land Registration Act 2002 (Commencement No 4) Order 2003, SI 2003/1725): formerly, it was provided that a mortgagee of registered land was not affected with notice of a trust, whether express, implied or constructive (see the Land Registration Act 1925 s 74 (repealed)).

10 See the Trusts of Land and Appointment of Trustees Act 1996 s 10; and **TRUSTS** vol 48 (2007 Reissue) PARA 1036.

11 See the Law of Property Act 1925 ss 2, 27(2); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 249. See also *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL; *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (1999) 80 P & CR 256, CA. It is not necessary for any advance to be made on the grant of the legal charge for overreaching to occur: *State Bank of India v Sood* [1997] Ch 276, [1997] 1 All ER 169, CA. See also the Trustee Act 1925 s 14 (see **TRUSTS** vol 48 (2007 Reissue) PARA 1051); and the Settled Land Act 1925 ss 16(2), 94, 95 (see **SETTLEMENTS** vol 42 (Reissue) PARAS 753, 768, 785). As to the meaning of 'trust corporation' see **TRUSTS** vol 48 (2007 Reissue) PARA 798.

12 *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL.

13 *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (1999) 80 P & CR 256, CA. As to proprietary estoppel see **ESTOPPEL** vol 16(2) (Reissue) PARA 1089 et seq.

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179. Form of mortgage by trustees.

A trustee or other fiduciary owner who mortgages the trust estate does not usually covenant to pay the money borrowed¹, and a provision expressly excluding any personal liability on his part for payment is commonly inserted in the mortgage. A covenant by a trustee to pay out of a trust fund prevents a personal liability being implied², and a covenant as trustee but not otherwise does not impose a personal liability³. A trustee is under no obligation to exclude the statutory power of sale which is an implied provision in every mortgage⁴, but he may not insert a consolidation clause extending to mortgages other than those made by him as trustee⁵. Where, however, a trustee brings within the scope of the mortgage security other payments due from the trust estate, the case appears to be different⁶.

1 See *Stroughill v Anstey* (1852) 1 De GM & G 635 at 642.

2 *Mathew v Blackmore* (1857) 1 H & N 762.

3 *Re Robinson's Settlement, Gant v Hobbs* [1912] 1 Ch 717 at 728, CA. A covenant 'as trustee but not so as to impose any personal liability' can, however, be enforced against the covenantor personally, if the effect of the qualification would be to negative the covenant, eg where the covenant is to pay and indemnify: *Watling v Lewis* [1911] 1 Ch 414 at 423-424 per Warrington J; and see *Furnivall v Coombes* (1843) 5 Man & G 736. See further **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 213; **TRUSTS** vol 48 (2007 Reissue) PARA 1080.

4 See the Law of Property Act 1925 s 182; and **TRUSTS** vol 48 (2007 Reissue) PARA 1116. The statutory power is given by s 101(1)(i): see PARA 443 et seq. Provisions corresponding to s 182 were first made by the Conveyancing Act 1881 s 66 (repealed).

5 See *Thorne v Thorne* [1893] 3 Ch 196.

6 *Cruikshank v Duffin* (1872) LR 13 Eq 555.

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180. Power to invest on mortgage.

The provision in the Trustee Act 2000 conferring on trustees, subject to the expression of a contrary intention in the trust instrument, the same power to make an investment of any kind¹ as if they were absolutely entitled to the trust assets² impliedly empowers trustees to lend trust money upon a mortgage of realty³.

¹ This power does not include power to make investments in land other than in loans secured on land: Trustee Act 2000 s 3(3).

² See the Trustee Act 2000 s 3; and **TRUSTS** vol 48 (2007 Reissue) PARA 1012.

³ It is, however, considered unlikely that the standard investment criteria (see the Trustee Act 2000 s 4; and **TRUSTS** vol 48 (2007 Reissue) PARA 1013) would allow such investment on personal security. See also *Mills v Osborne* (1834) 7 Sim 30; *Forbes v Ross* (1788) 2 Bro CC 430; *Langston v Ollivant* (1807) Coop G 33; *Pickard v Anderson* (1872) LR 13 Eq 608; and **TRUSTS** vol 48 (2007 Reissue) PARA 1010.

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181. Form of mortgage to trustees.

A deed of mortgage to trustees should contain a statement that the money is advanced out of a joint account¹. It should not, unless in exercise of an express authority, contain a provision that the mortgage is not to be called in for a period of years². The statutory power of sale³ ought not as a rule to be excluded where the mortgagees are trustees, but the exclusion of such a power is not necessarily a breach of trust⁴.

¹ See PARA 212. Where it was declared in a mortgage that the money was advanced by the mortgagees on a joint account, a power of sale given to the mortgagees, their heirs and assigns was exercisable by their survivor: *Hind v Poole* (1855) 1 K & J 383. The court would not go behind a joint account clause in the absence of notice that the mortgage money was trust money from some source other than the fact of the joint account: see *Re Harman and Uxbridge and Rickmansworth Rly Co* (1883) 24 ChD 720; *Re Jackson, Smith v Sibthorpe* (1887) 34 ChD 732; *Re Blalberg and Abrahams* [1899] 2 Ch 340. See also *Re West and Hardy's Contract* [1904] 1 Ch 145; *Re Balen and Shepherd's Contract* [1924] 2 Ch 365.

² *Mant v Leith* (1852) 15 Beav 524; *Vickery v Evans* (1863) 33 Beav 376.

³ See the Law of Property Act 1925 s 101(1)(i); and PARA 443 et seq.

⁴ *Farrar v Barraclough* (1854) 2 Sm & G 231. As to the investment powers and duties of trustees, and the consequences of an investment being made in breach of trust, see **TRUSTS** vol 48 (2007 Reissue) PARA 1005 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(4) CORPORATE AND UNINCORPORATE BODIES/182. Corporations and companies.

(4) CORPORATE AND UNINCORPORATE BODIES

182. Corporations and companies.

A corporation created by royal charter has prima facie the power to do with its property all such acts as an ordinary person can do¹. A corporation created by statute can mortgage its property only in so far as it is expressly or impliedly authorised by the statute². Likewise, a company formed under a statute such as the Companies Act 2006 has the powers given by its constitution, although the power to borrow and secure such borrowing by mortgage will be implied if it is incidental to the purposes of the company³. The validity of a mortgage granted by a company may not be called into question on the ground of lack of capacity by reason of anything in the company's constitution⁴. In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution⁵; and for these purposes a person dealing with a company is not bound to inquire as to any limitation on the powers of the directors to bind the company or authorise others to do so⁶. A mortgagee is entitled to assume, in the absence of notice to the contrary, that the internal procedures of a company have been properly complied with⁷.

A company is liable in respect of equitable mortgages entered into by its agents when acting within the scope of their authority provided it is within the company's powers⁸. In favour of a mortgagee in good faith who gives valuable consideration a legal mortgage is deemed to have been duly executed by a company if it purports to be signed by two authorised signatories, or by a director of the company in the presence of a witness who attests the signature⁹. A charge created by a company over land, book debts and certain other property is void against the liquidator or administrator and any creditor of the company unless duly registered in the register of companies¹⁰.

The powers to mortgage benefices and to mortgage the glebe and profits of a benefice are considered elsewhere in this work¹¹.

1 *Baroness Wenlock v River Dee Co* (1883) 36 ChD 675n at 685n, CA; on appeal (1885) 10 App Cas 354, HL. See also **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1238. As to incorporation by charter see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1128.

2 *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 ChD 61 at 70, CA; affd on appeal sub nom *Cunliffe, Brooks & Co v Blackburn Benefit Society* (1884) 9 App Cas 857, HL. See also **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1238.

3 *Re Badger, Mansell v Viscount Cobham* [1905] 1 Ch 568 at 574; and see **COMPANIES** vol 15 (2009) PARA 1256.

4 See the Companies Act 2006 s 39(1); and **COMPANIES** vol 14 (2009) PARA 265. This section has effect subject to s 42 in the case of companies that are charities: see s 39(2); and **COMPANIES** vol 14 (2009) PARA 265.

5 See the Companies Act 2006 s 40(1); and **COMPANIES** vol 14 (2009) PARA 263. However, this provision does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors: see s 40(4); and **COMPANIES** vol 14 (2009) PARA 263. Notwithstanding this provision, transactions between a company and a director of the company or its holding company or with a person connected with such a director are voidable at the instance of the company: see s 41; and **COMPANIES** vol 14 (2009) PARA 264.

6 See the Companies Act 2006 s 40(2); and **COMPANIES** vol 14 (2009) PARA 263.

7 *Royal British Bank v Turquand* (1856) 25 LJQB 317; *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629; *Duck v Tower Galvanizing Co Ltd* [1901] 2 KB 314; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 at 295, [1985] 3 All ER 52 at 86, CA, per Slade LJ. See also **COMPANIES** vol 14 (2009) PARA 267.

8 As to equitable mortgages see PARA 118 et seq.

9 See the Companies Act 2006 s 44; and **COMPANIES** vol 14 (2009) PARA 288.

10 See the Companies Act 2006 s 874; and **COMPANIES** vol 15 (2009) PARA 1294.

11 See **ECCLESIASTICAL LAW** vol 14 PARAS 628, 1146 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(4) CORPORATE AND UNINCORPORATE BODIES/183. Local authorities and other public authorities.

183. Local authorities and other public authorities.

All money borrowed by a local authority¹, together with any interest on it, is charged indifferently on all the revenues of the authority², and all securities created by a local authority rank equally without any priority³. Any other purported mortgage or charge of local authority property as security for money borrowed or otherwise owing is ultra vires and unenforceable⁴. A local authority may borrow money for any purpose relevant to its functions under any enactment⁵ or for the purposes of the prudent management of its financial affairs⁶, but may not borrow if so doing would result in a breach of limits determined by the authority of the Secretary of State⁷. A person lending money to a local authority is not bound to inquire whether the authority has power to borrow the money and will not be prejudiced by the absence of any such power⁸.

A local authority⁹ may advance money to a person for the purpose of acquiring or constructing a house, or converting a building into a house, or acquiring a building and converting it into a house¹⁰; and a local authority which is not a local housing authority¹¹ may advance money to a person for the purpose of altering, enlarging, repairing or improving a house¹². Local authorities, including those which are not local housing authorities, may advance money for the purpose of facilitating the repayment of an amount outstanding on a previous loan made for any of the purposes for which they may advance money under these provisions¹³. The advance and the interest on it must be secured by mortgage and no such advance may be made unless the estate proposed to be mortgaged is either in fee simple absolute in possession, or is an estate for a term of years absolute for a period of not less than ten years in excess of the period fixed for repayment¹⁴.

Under certain circumstances a secure tenant has a right to buy¹⁵ property from a local authority on rent to mortgage terms¹⁶. The property is mortgaged to a lender who advances an initial payment to the authority towards the purchase price and the mortgage is repaid by instalments based on the rent formerly paid to the authority; the balance of the purchase price takes the form of an interest-free loan from the authority, secured by a charge on the property, to be repaid on a later disposal of the property; and the amount repayable to the local authority is adjusted to take account, inter alia, of any change in the overall value of the property at the time of disposal¹⁷.

Local authorities have other powers to assist mortgagors, including the power to indemnify mortgagees against default¹⁸, and to contribute towards the costs of a mortgagor's legal charge or proposed legal charge¹⁹.

A local authority has the power to dispose of land held for housing purposes and leave part of the disposal price outstanding on a mortgage²⁰.

Statutory powers to mortgage property or to advance money on mortgage are conferred, where requisite, on other public authorities or institutions by statutes investing them with special functions²¹. Conversely, there may be a statutory prohibition on the mortgage or charging of assets²².

1 For the purposes of the Local Government Act 2003 Pt 1 (ss 1-24), the following are local authorities: county, county borough and district councils (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 23); the Greater London Authority (see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 79 et seq); a functional body within the meaning of the Greater London Authority Act 1999 (see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 213); a

London borough council (see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 35 et seq); the Common Council of the City of London (see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 51 et seq) in its capacity as a local authority, police authority (see **POLICE** vol 36(1) (2007 Reissue) PARA 139 et seq) or port health authority (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 102); the Council of the Isles of Scilly (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36); a waste disposal authority established under the Local Government Act 1985 s 10 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 620; **LOCAL GOVERNMENT** vol 69 (2009) PARA 17); a joint authority established by Pt 4 (ss 23-42) (fire and rescue services and transport) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 47 et seq); a joint waste authority established for an area in England by an order under the Local Government and Public Involvement in Health Act 2007 s 207 (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 51); a joint planning board constituted for an area in Wales outside a National Park by an order under the Town and Country Planning Act 1990 s 2(1B) (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 30); a fire and rescue authority constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies (see **FIRE SERVICES**); a police authority established under the Police Act 1996 s 3 (see **POLICE** vol 36(1) (2007 Reissue) PARA 139); and any other body specified for these purposes by regulations: see the Local Government Act 2003 s 23(1) (amended by the Civil Contingencies Act 2004 s 32(1), Sch 2 para 10(3)(e)); the Fire and Rescue Services Act 2004 s 53(1), Sch 1 paras 99, 100; SI 2005/886; the Local Government and Public Involvement in Health Act 2007 s 209(2), Sch 13 Pt 2 para 55(1), (2)). Additional authorities are specified in the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003, SI 2003/3146, reg 32 and the Local Authorities (Capital Finance and Accounting) (Wales) Regulations 2003, SI 2003/3239, reg 26: see **LOCAL GOVERNMENT** vol 29(1) (2001 Reissue) PARA 618 et seq. For the purposes of the Local Government Act 2003 ss 2(3), (4), 6 (see the text to notes 7, 8), references to a local authority include parish and community councils (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 27 et seq, 41 et seq) and charter trustees (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 113); Local Government Act 2003 s 19(1).

2 Local Government Act 2003 s 13(3).

3 Local Government Act 2003 s 13(4).

4 See the Local Government Act 2003 s 13(1), (2).

5 Local Government Act 2003 s 1(a).

6 Local Government Act 2003 s 1(b). See also *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, [1991] 1 All ER 545, HL.

7 See the Local Government Act 2003 ss 2-4; and **LOCAL GOVERNMENT**.

8 Local Government Act 2003 s 6. See also the Local Government (Contracts) Act 1997; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 411 et seq.

9 For these purposes, 'local authority' means a county, county borough, district or London borough council, the Common Council of the City of London or the Council of the Isles of Scilly: see the Housing Act 1985 s 4(e) (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 5(3)); and **HOUSING** vol 22 (2006 Reissue) PARA 6.

10 See the Housing Act 1985 s 435(1)(a)-(c); and **HOUSING** vol 22 (2006 Reissue) PARA 688.

11 As to local housing authorities see the Housing Act 1985 s 1; and **HOUSING** vol 22 (2006 Reissue) PARA 9.

12 Housing Act 1985 s 435(1A)(a) (s 435(1A) added by SI 2002/1860); and **HOUSING** vol 22 (2006 Reissue) PARA 688.

13 See the Housing Act 1985 s 435(1), (1A)(b) (as added: see note 12); **HOUSING** vol 22 (2006 Reissue) PARA 688.

14 See the Housing Act 1985 s 436; and **HOUSING** vol 22 (2006 Reissue) PARA 689.

15 As to the right to buy see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1803 et seq.

16 See the Housing Act 1985 s 143; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1872.

17 See the Housing Act 1985 ss 143A-153; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1872 et seq.

18 See the Housing Act 1985 s 442; and **HOUSING** vol 22 (2006 Reissue) PARA 694.

19 See the Housing Act 1985 s 443; and **HOUSING** vol 22 (2006 Reissue) PARA 695.

20 See the Housing Act 1985 ss 32, 33; and **HOUSING** vol 22 (2006 Reissue) PARAS 305, 306.

21 Eg the National Trust may borrow on mortgage of its alienable property (see the National Trust Act 1907 s 22; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 997), and internal drainage boards may raise money on mortgage (see the Land Drainage Act 1991 s 55; and **WATER AND WATERWAYS** vol 101 (2009) PARA 640).

22 Eg in the case of NHS trusts: see the National Health Service Act 2006 Sch 5 para 3(3); and **HEALTH SERVICES** vol 54 (2008) PARA 515.

UPDATE

183 Local authorities and other public authorities

NOTE 9--Housing Act 1985 s 4(e) now s 4(1)(e) (further amended by Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 68).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(4) CORPORATE AND UNINCORPORATE BODIES/184. Building societies, friendly societies etc.

184. Building societies, friendly societies etc.

The power of building societies to make advances¹, the nature of the security which may be accepted or required, the redemption, enforcement and discharge of building society mortgages² and the powers of building societies to borrow money and give security³ are considered elsewhere in this work.

Friendly societies and industrial and provident societies may borrow or lend on mortgage if so authorised by their rules. These societies, too, are considered elsewhere⁴.

1 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2005 et seq.

2 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2013 et seq.

3 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1916 et seq.

4 As to friendly societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2081 et seq. As to industrial and provident societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2394 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(4) CORPORATE AND UNINCORPORATE BODIES/185. Charity trustees.

185. Charity trustees.

Land held on charitable, ecclesiastical or public trusts is now held on a trust of land, and charitable trustees have all the powers of an absolute owner, subject to statutory restrictions¹. No mortgage of land held by or on trust for a charity other than an exempt charity² may be granted without an order of the court or of the Charity Commission³ unless the charity trustees have obtained and considered proper advice before granting the mortgage⁴. The mortgage must contain a statement that the land is held by or on trust for a charity and indicating whether the statutory restrictions apply⁵. If they do apply, the mortgage must also contain a certificate showing that the statutory requirements have been complied with; and where such a

certificate is given, it is conclusively presumed in favour of a person who acquires an interest in the land for money or money's worth (whether under the mortgage or afterwards) that the facts were as stated in the certificate⁶. Where no such certificate is given, the mortgage is valid in favour of such a person acting in good faith⁷.

In the case of charity property other than land, the power to mortgage is governed by the instrument or instruments regulating the charity⁸.

1 See the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 2(6), 6(8); and **TRUSTS** vol 48 (2007 Reissue) PARAS 605, 1035.

2 As to exempt charities see **CHARITIES** vol 8 (2010) PARA 315.

3 As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.

4 See the Charities Act 1993 s 38; and **CHARITIES** vol 8 (2010) PARA 398. As to disposal of charity property generally see **CHARITIES** vol 8 (2010) PARA 395 et seq.

5 See the Charities Act 1993 s 39(1), (1A), (1B); and **CHARITIES** vol 8 (2010) PARA 399.

6 See the Charities Act 1993 s 39(2), (3); and **CHARITIES** vol 8 (2010) PARA 399.

7 See the Charities Act 1993 s 39(4); and **CHARITIES** vol 8 (2010) PARA 399.

8 See eg **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 953.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/2. PARTIES TO MORTGAGES/(4) CORPORATE AND UNINCORPORATE BODIES/186. Clubs.

186. Clubs.

The property of an unincorporated club¹ is normally vested in trustees² whose powers are governed by the rules of the club. The rules of an unincorporated club or the memorandum and articles of an incorporated club may authorise the issue of club debentures³.

1 As to the various kinds of clubs see **CLUBS** vol 13 (2009) PARA 204 et seq.

2 See **CLUBS** vol 13 (2009) PARA 257. As to the powers of trustees to grant mortgages see PARA 175 et seq.

3 See **CLUBS** vol 13 (2009) PARAS 250-252.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(1) LEGAL MORTGAGES OF LAND/(i) Historical Background/187. Mortgages of freeholds.

3. CREATION OF MORTGAGES AND CHARGES

(1) LEGAL MORTGAGES OF LAND

(i) Historical Background

187. Mortgages of freeholds.

Before 1926, a legal mortgage of freehold property was made by the same form of assurance and framed on the same principles as an absolute conveyance, subject, however, to a proviso for redemption. Any purported conveyance of an estate in fee simple by way of mortgage¹ made after 1925 operates (to the extent of the estate of the mortgagor²) as a demise of the land³ to the mortgagee⁴ for a term of years absolute without impeachment of waste, but subject to cesser on redemption⁵, so that a first or only mortgagee takes a term of 3,000 years from the date of the mortgage⁶, and a second or subsequent mortgagee takes a term (commencing from the date of the mortgage) one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of the second or subsequent mortgagee⁷.

1 As to the meaning of 'mortgage' see PARA 101 note 4.

2 As to the meaning of 'mortgagor' see PARA 104 note 1.

3 As to the meaning of 'land' see PARA 104 note 2.

4 As to the meaning of 'mortgagee' see PARA 104 note 1.

5 Law of Property Act 1925 s 85(2). Any such purported conveyance includes an absolute conveyance with a deed of defeasance and any other assurance which, but for s 85(2), would operate in effect to vest the fee simple in a mortgagee subject to redemption: s 85(2). Since 13 October 2003 (ie the date on which the Land Registration Act 2002 Sch 11 para 2 was brought into force by the Land Registration Act 2002 (Commencement No 4) Order 2003, SI 2003/1725), this provision has not applied to registered land, but, subject to that, it applies whether or not the land is registered land and whether or not the mortgage is expressed to be made by way of trust for sale or otherwise: see the Law of Property Act 1925 s 85(3) (amended by the Land Registration Act 2002 Sch 11 para 2(6)). As to registered land generally see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 801 et seq. For examples of mortgages by trust for sale see *Re Alison, Johnson v Mounsey* (1879) 11 ChD 284, CA; *Locking v Parker* (1872) 8 Ch App 30. Note that trusts for sale are now referred to as trusts of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66.

6 Law of Property Act 1925 s 85(2)(a).

7 Law of Property Act 1925 s 85(2)(b).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(1) LEGAL MORTGAGES OF LAND/(i) Historical Background/188. Mortgage of leaseholds.

188. Mortgage of leaseholds.

Before 1926, a legal mortgage of leasehold property was made either by way of assignment of the whole term or by way of sub-demise. The former method was adopted only when the rent was small and the lessee's covenants were not burdensome, for the effect of an assignment was to establish a privity between the lessor and the mortgagee, so that the mortgagee could be sued for breach of covenant¹. The alternative course was to demise the property to the mortgagee for the whole of the term, less one or more days². Under this form of security the mortgagee was under no personal liability to the lessor³. The only objection to it was that it left the nominal reversion outstanding in the mortgagor. To obviate this it was the practice to insert in the mortgage a declaration by the mortgagor that he held the head term in trust for the mortgagee, but subject to the right of redemption. This was supplemented by a power for the mortgagee to remove the mortgagor and appoint a nominee of his own to be trustee in the place of the mortgagor and vest the head term in the new trustee⁴. A power of attorney to assign the nominal reversion was sometimes added.

Any purported assignment of a term of years absolute⁵ by way of mortgage⁶ made after 1925 operates (to the extent of the mortgagor's⁷ estate) as a sub-demise of the leasehold land⁸ to

the mortgagee⁹ for a term of years absolute, but subject to cesser on redemption¹⁰, so that the term taken by the first or only mortgagee is ten days less than the term expressed to be assigned¹¹; and the term taken by a second or subsequent mortgagee is one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of the second or subsequent mortgagee if the length of the last-mentioned term permits, and in any case a term less by one day at least than the term expressed to be assigned¹².

1 *Williams v Bosanquet* (1819) 1 Brod & Bing 238. Cf *Purchase v Lichfield Brewery Co* [1915] 1 KB 184.

2 It was held that a second mortgage by demise for a term concurrent with the first mortgage by demise created a legal term, not a mere equitable charge (*Re Moore and Hulm's Contract* [1912] 2 Ch 105); and this is so under the present system (see the Law of Property Act 1925 s 149(5)).

3 A lessor had no equity to compel a person between whom and himself there was no privity to take an assignment of the term or make himself liable on the covenants, even though such person had taken possession: *Moore v Choat* (1839) 8 Sim 508; *Moore v Greg* (1848) 2 Ph 717.

4 See *London and County Banking Co v Goddard* [1897] 1 Ch 642. A declaration of trust in favour of the mortgagee did not render him liable to the lessor for the rent and covenants of the lease: *Walters v Northern Coal Mining Co* (1855) 5 De GM & G 629. Nor did a declaration of trust prevent the trustee in bankruptcy of the mortgagor from disclaiming the nominal reversion: *Re Maughan, ex p Monkhouse* (1885) 14 QBD 956.

5 In the Law of Property Act 1925, 'term of years absolute' means a term of years (taking effect either in possession or in reversion whether or not at a rent) with or without impeachment for waste, subject or not to another legal estate, and either certain or liable to determination by notice, re-entry, operation of law or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest), but it does not include any term of years determinable with life or lives or with the cesser of a determinable life interest, nor, if created after 1 January 1926, a term of years which is not expressed to take effect in possession within 21 years after its creation where required by the Law of Property Act 1925 to take effect within that period; and 'term of years' includes a term for less than a year, or for a year or years and a fraction of a year or from year to year: s 205(1)(xxvii). As to the meaning of 'legal estate' see PARA 105 note 2.

6 As to the meaning of 'mortgage' see PARA 101 note 4.

7 As to the meaning of 'mortgagor' see PARA 104 note 1.

8 As to the meaning of 'land' see PARA 104 note 2.

9 As to the meaning of 'mortgagee' see PARA 104 note 1.

10 Law of Property Act 1925 s 86(2). See also *Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 All ER 143, [1964] 1 WLR 139, CA. Any such purported assignment includes an absolute assignment with a deed of defeasance and any other assurance which, but for the Law of Property Act 1925 s 86(2), would operate in effect to vest the mortgagor's term in a mortgagee subject to redemption: s 86(2). Since 13 October 2003 (ie the date on which the Land Registration Act 2002 Sch 11 para 2 was brought into force by the Land Registration Act 2002 (Commencement No 4) Order 2003, SI 2003/1725), this provision has not applied to registered land, but, subject to that, it applies whether or not the land is registered land and whether or not the mortgage is made by way of sub-mortgage of a term of years absolute, or is expressed to be by way of trust for sale or otherwise: see the Law of Property Act 1925 s 86(3) (amended by the Land Registration Act 2002 Sch 11 para 2(7)). As to registered land generally see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 801 et seq. Note that trusts for sale are now referred to as trusts of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66.

11 Law of Property Act 1925 s 86(2)(a).

12 Law of Property Act 1925 s 86(2)(b).

189. Mortgages of limited interests.

Formerly life estates and reversions and remainders, whether vested or contingent, could exist at law in land and might be the subject of a legal mortgage¹, but they can now exist only as equitable interests², and a mortgage of a life interest or reversionary interest now takes the form of an equitable mortgage effected by conveyance subject to redemption or merely by charge³.

1 Formerly mortgages of life estates in land were sometimes made by a demise of the land for 99 years if the mortgagor should so long live. The Law of Property Act 1925 s 149(6), which converts terms determinable with life or lives into terms of 90 years determinable on notice after the dropping of a life, does not apply to a term taking effect in equity under a settlement or created out of an equitable interest under a settlement for mortgage, indemnity or other like purposes: see s 149(6) proviso (a); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 240.

2 See the Law of Property Act 1925 s 1(1), (3).

3 As to equitable mortgages see generally PARAS 118 et seq, 238 et seq. As to the statutory power of a tenant for life under a settlement to mortgage the settled land (as distinct from his own equitable life interest in it) see PARA 168. As to the court's power to grant relief in the case of unconscionable bargains made with persons having reversionary interests in property see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 854 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(1) LEGAL MORTGAGES OF LAND/(ii) Nature of Legal Mortgage of Land/A. TYPES OF MORTGAGE/190. Mortgages by demise.

(ii) Nature of Legal Mortgage of Land

A. TYPES OF MORTGAGE

190. Mortgages by demise.

A mortgage¹ of an estate in fee simple can be effected at law by a demise for a term of years absolute², subject to a provision for cesser on redemption³. Likewise, a mortgage of a term of years absolute is capable of being made at law by a sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor⁴ and subject to a provision for cesser on redemption⁵. As there may be concurrent demises, whether for the same or for different terms, a succession of legal mortgages by demise is possible⁶.

These provisions do not apply to registered land⁷.

1 As to the meaning of 'mortgage' see PARA 101 note 4.

2 As to the meaning of 'term of years absolute' see PARA 188 note 5.

3 See the Law of Property Act 1925 s 85(1). Powers to mortgage and to lend money on mortgage of an estate in fee simple are to be construed as powers to mortgage the estate for a term of years absolute, without impeachment for waste, or by a charge by way of legal mortgage or to lend on such security: s 85(4). As to the meaning of 'legal mortgage' see PARA 104 note 1. As to charges by way of legal mortgage see PARA 191.

4 As to the meaning of 'mortgagor' see PARA 104 note 1.

5 See the Law of Property Act 1925 s 86(1). Where a licence to sub-demise by way of mortgage is required, the licence must not be unreasonably refused: s 86(1). This provision applies whether or not the mortgage is made by way of sub-mortgage for a term of years absolute, or is expressed to be by way of trust for sale or

otherwise: see s 86(3) (amended by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (7)). Note that trusts for sale of land are now referred to as trusts of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66.

Powers to mortgage or to lend money on mortgage of a term of years absolute by way of assignment are to be construed as a power to mortgage the term by sub-demise for a term of years absolute or by a charge by way of legal mortgage, or to lend on such security: see the Law of Property Act 1925 s 86(4).

6 See the Law of Property Act 1925 s 149(5).

7 See the Land Registration Act 2002 s 23(1)(a); PARA 155; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906.

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191. Legal charges.

A charge by way of legal mortgage can be created on freehold and leasehold property¹. The charge is created by deed expressed to be by way of legal mortgage². It ranks as a legal estate³, although no term of years is actually created⁴, and it gives the chargee the same protection, powers and remedies as if a mortgage term for 3,000 years without impeachment of waste in the case of freeholds⁵, or a mortgage sub-term less one day than the term vested in the mortgagor in the case of leaseholds⁶, had been created in the chargee's favour⁷. A chargee by way of legal mortgage may take proceedings to obtain possession from the occupiers and persons in receipt of rents and profits or any of them⁸, and may protect his charge by applying for relief against forfeiture, in the case of a mortgage of leasehold land⁹.

1 See the Law of Property Act 1925 ss 85(1), 86(1).

2 See the Law of Property Act 1925 ss 85(1), 86(1). It is submitted that the fact that the charge is by way of legal mortgage must be expressed somewhere in the deed if it is to take effect as such: cf *Sopher v Mercer* [1967] CLY 2543 (county court).

3 See the Law of Property Act 1925 ss 1(2)(c), (4), 205(1)(x); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 45. See further *Caunce v Caunce* [1969] 1 All ER 722, [1969] 1 WLR 286.

4 *Weg Motors Ltd v Hales* [1962] Ch 49 at 73-74, [1961] 3 All ER 181 at 190, CA, per Lord Evershed MR, and at 77 and 192 per Donovan LJ; *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536; *Thompson (Inspector of Taxes) v Salah* [1972] 1 All ER 530. See also *Edwards v Marshall-Lee* (1975) 235 Estates Gazette 901, 119 Sol Jo 506. In *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* [1972] Ch 148, [1971] 2 All ER 468, the legal charge was assumed to create a notional term.

5 Law of Property Act 1925 s 87(1)(a).

6 Law of Property Act 1925 s 87(1)(b).

7 Law of Property Act 1925 s 87(1). Section 87(1) is not affected by the Land Registration Act 2002 s 23(1)(a) (which provides that owner's powers in relation to a registered estate do not include power to mortgage by demise or sub-demises: see PARA 155): Law of Property Act 1925 s 87(4) (added by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (8)). See also *Grand Junction Co Ltd v Bates* [1954] 2 QB 160 at 168, [1954] 2 All ER 385 at 388 per Upjohn J; *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436 at 443, [1963] 3 All ER 828 at 831, CA, per Lord Denning MR; *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402 at 431, [1965] 3 All ER 673 at 679, CA, per Harman LJ.

8 See the Law of Property Act 1925 s 87(1).

9 See the Law of Property Act 1925 s 146(4); PARA 401; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 627.

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192. Statutory mortgages.

A mortgage of freehold or leasehold land may be made by a deed expressed to be by way of statutory mortgage in a prescribed form with such modifications as circumstances may require¹. This is a special form of charge by way of legal mortgage, and is deemed to include covenants for payment of principal and interest and a proviso for discharge of the mortgaged property or transfer of the benefit as the mortgagor may direct².

1 See the Law of Property Act 1925 s 117(1), Sch 4 Forms 1, 4.

2 See the Law of Property Act 1925 s 117(2).

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193. Mortgage by estoppel.

A grantor cannot dispute the validity or effect of his own grant, and accordingly a mortgagor who has no legal estate at all¹ is estopped at common law from denying that he had a legal title². The estoppel binds the mortgagor and all persons claiming under him whether for value or not, other than a bona fide purchaser for value from the mortgagor without notice of the earlier transaction³. The title of the mortgagee does not prevail over the title of the true owner and the persons claiming under him; if, however, the mortgagor subsequently acquires the legal title from the true owner, the estoppel is fed and the mortgagee's title becomes good against all except a bona fide purchaser for value from the mortgagor without notice of the earlier transaction⁴.

Where the grant also contains an express recital or other clear and unequivocal representation of the mortgagor's title, he is estopped from denying that he had the particular title which he had asserted; the estoppel is not excluded by his ownership of some other and lesser estate⁵. In such a case, the estoppel binds the mortgagor and all persons claiming under him, whether for value or not and with or without notice; so that if the mortgagor afterwards acquires the legal estate which he had represented that he owned, the mortgagee obtains a title which is good against the whole world⁶.

If a mortgagor with a defective title purports and intends to demise property for value, any interest subsequently acquired by him in that property is available to make the conveyance effectual even though the defect in title is apparent on the face of the conveyance⁷; and if the mortgagor's title is defeated, but he afterwards acquires the same land under another title, the mortgage attaches to the new title⁸.

A mortgage by estoppel cannot be registered as a legal charge unless and until the estoppel is fed by the acquisition of the legal estate by the mortgagor⁹.

1 If the grantor has a legal estate less than that which he purports to grant, the grantee obtains an estate in interest (but not by estoppel), and that estate cannot exceed the estate of his grantor: see PARA 194. In such a

situation, as there is no estoppel to be fed, the grantor's subsequent acquisition of a larger title capable of supporting the estate which he has granted will not enure for the benefit of the grantee: see *Universal Permanent Building Society v Cooke* [1952] Ch 95, [1951] 2 All ER 893, CA; *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA. See also **ESTOPPEL** vol 16(2) (Reissue) PARA 1034.

2 *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA. See further **ESTOPPEL** vol 16(2) (Reissue) PARA 1033.

3 *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA. See also *Right d Jeffreys v Bucknell* (1831) 2 B & Ad 278; *General Finance, Mortgage and Discount Co v Liberator Permanent Benefit Building Society* (1878) 10 ChD 15.

4 *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA.

5 *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA.

6 *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA.

7 See *Re Bridgwater's Settlement, Partridge v Ward* [1910] 2 Ch 342; *Re Hoffe's Estate Act 1855* (1900) 82 LT 556.

8 *Seabourne v Powel* (1686) 2 Vern 11; *Noel v Bewley* (1829) 3 Sim 103; *Re Gregory, Gascoigne v Gregory* (1912) 134 LT Jo 106; *Gresham Life Assurance Society v Crowther* [1914] 2 Ch 219 (affd [1915] 1 Ch 214, CA, without reference to this point).

9 *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA. See also **ESTOPPEL** vol 16(2) (Reissue) PARA 1033.

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B. PROPERTY TO WHICH THE MORTGAGE EXTENDS

194. Effect of mortgagor's want of legal estate.

Where a mortgagor purports to mortgage a greater estate in property than that which he possesses, the conveyance¹ or transfer² by which the purported mortgage is created passes to the mortgagee such interest as the mortgagor has in the property³. Thus where joint owners of a property purport to grant a mortgage but it is void or voidable as against one of the joint owners, the execution of the mortgage by the other takes effect as an equitable charge over his beneficial interest in the property⁴. An imperfect legal mortgage, on the other hand, is treated as an agreement to create a mortgage⁵.

Where there is an effective agreement⁶ to create a mortgage over a greater estate in property than that which the mortgagor possesses, it may also create an equitable charge over such property as the mortgagor possesses⁷, or the court may order the mortgagor to execute a charge over such interest as he has⁸.

1 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; and 'convey' has a corresponding meaning: see the Law of Property Act 1925 s 205(1)(ii).

2 As to transfers see the Land Registration Act 2002; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906 et seq.

3 See the Law of Property Act 1925 s 63. This provision does not apply to a mere agreement to create a mortgage.

4 *Ahmed v Kendrick* (1987) 56 P & CR 120, CA. See also *Zandfarid v Bank of Credit and Commerce International SA (in liquidation)* [1996] 1 WLR 1420, [1997] 1 FCR 78; *First National Bank plc v Achampong* [2003] EWCA Civ 487, [2004] 1 FCR 18. No interest passes, however, if the purported mortgage is intended by both parties to it to be a sham transaction: *Penn v Bristol and West Building Society* [1996] 2 FCR 729, [1995] 2 FLR 938.

5 See PARA 240.

6 As to the requirements for a binding agreement see PARA 118.

7 *Murray v Guinness* [1998] NPC 79. See also *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA.

8 *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA; *Bankers Trust Co v Namdar* [1997] NPC 22, CA.

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195. Fixtures.

A legal mortgage of land comprises, without specific mention, all fixtures which at the date of the mortgage¹ are, or at any time afterwards during its continuance² may be, annexed to the land³. This rule applies also to an equitable mortgage⁴. So far as fixtures are concerned, mortgages of leaseholds are on the same footing as mortgages of freeholds⁵. If a tenant who has put up fixtures, which as against the landlord he is entitled to remove, mortgages his leasehold interest, the mortgage will pass those fixtures whether they are mentioned or not⁶, and whether the security is a legal mortgage or by a deposit of title deeds⁷, and whether the articles were affixed before or after the mortgage⁸. In the case of mortgages of freeholds and of leaseholds, where the mortgage includes fixtures or chattels personal, any statutory power of sale and any right to foreclose or take possession extends to the absolute or other interest in them affected by the charge⁹.

Where a mortgagor in possession, with the mortgagee's knowledge and acquiescence, lets premises to a tenant who brings upon them trade fixtures, the fixtures do not pass to the mortgagee but may be removed by the tenant¹⁰.

1 *Mather v Fraser* (1856) 2 K & J 536; *Longbottom v Berry* (1869) LR 5 QB 123; *Holland v Hodgson* (1872) LR 7 CP 328, Ex Ch; *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch 74.

2 *Walmsley v Milne* (1859) 7 CBNS 115; *Tottenham v Swansea Zinc Ore Co Ltd* (1885) 52 LT 738; *Cullwick v Swindell* (1866) LR 3 Eq 249; *Climie v Wood* (1868) LR 3 Exch 257 (affd (1869) LR 4 Exch 328); *Monti v Barnes* [1901] 1 KB 205, CA.

3 See *TSB Bank plc v Botham* [1996] EGCS 149, sub nom *Botham v TSB Bank plc* (1996) 73 P & CR D1, CA (a decision relating to which items in a dwelling house are fixtures); *Hulme v Brigham* [1943] KB 152, [1943] 1 All ER 204 (where printing machines standing by their own weight were held not to be fixtures although the driving apparatus was fixed to the freehold).

4 *Longbottom v Berry* (1869) LR 5 QB 123; *Re Lusty, ex p Lusty v Official Receiver* (1889) 60 LT 160; but see *Re Trethowan, ex p Tweedy* (1877) 5 ChD 559. As to a mortgagee's rights to fixtures as against the mortgagor's trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

5 *Meux v Jacobs* (1875) LR 7 HL 481; *Southport and West Lancashire Banking Co v Thompson* (1887) 37 ChD 64, CA.

6 *Meux v Jacobs* (1875) LR 7 HL 481.

7 *Re Inwood, ex p Cowell* (1848) 17 LJ Bcy 16; *Re Richards, ex p Astbury, ex p Lloyd's Banking Co* (1869) 4 Ch App 630; *Re Gawan, ex p Barclay* (1855) 5 De GM & G 403; *Williams v Evans* (1856) 23 Beav 239; *Boyd v Shorrock* (1867) LR 5 Eq 72. As to the creation of an equitable mortgage by deposit of title deeds see PARA 119 et seq (note, however, that the mere deposit of title deeds is no longer sufficient: see PARA 118).

8 *Meux v Jacobs* (1875) LR 7 HL 481.

9 See the Law of Property Act 1925 s 88(4) (freehold mortgages), s 89(4) (leasehold mortgages). As to the statutory power of sale see PARA 443 et seq. The mortgagee cannot, however, sell the fixtures separately: see PARA 463.

10 *Sanders v Davis* (1885) 15 QBD 218.

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196. Accretions and substitutions.

The mortgagee is entitled to accretions to the mortgaged property or property received in substitution for it by the mortgagor¹. Similarly, additions made by a second mortgagee enure to the benefit of the first mortgagee². If the mortgaged property is disposed of in a manner which destroys the mortgagee's estate³, a security interest automatically arises in the proceeds of sale in favour of the mortgagee⁴. In the case of renewable leaseholds, if either the mortgagor or mortgagee is able to obtain a renewal of the lease, the renewed lease is treated as engrafted upon the old and as forming part of the mortgage security⁵. Where an option to purchase the freehold reversion is part of the mortgage security and the mortgagee exercises the option, he is not entitled to retain the benefit of the exercise of the option; on redemption the mortgagor is entitled to get back the whole of his security and is therefore entitled to a conveyance of the freehold on payment of the principal, interest and the mortgagee's proper expenses, including the purchase price of the reversion⁶. Where a lease subject to a legal charge is forfeited on the mortgagor's default under the lease and an order⁷ has vested a new lease in the mortgagee as underlessee, the new lease is a substituted security for the mortgage and subject to the mortgagor's right of redemption⁸.

Where a tenant whose interest is mortgaged acquires the freehold⁹, the existence of the mortgage will prevent the merger¹⁰ of the enfranchising tenant's leasehold and freehold estates and the mortgagee's security will remain the lease¹¹. Where the mortgagor obtains an extended lease¹², it forms part of the mortgage security¹³ and the mortgagee who was entitled to possession of the title deeds relating to the original lease is entitled to possession of the deeds relating to the extended lease¹⁴.

1 *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223, [2002] 1 P & CR D1; *Re Kitchin, ex p Punnett* (1880) 16 ChD 226 at 236, CA.

2 *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 433; and see *Maxwell v Ashe* (1752) 1 Bro CC 444n; *Moody v Matthews* (1802) 7 Ves 174 (annuities charged on renewed leases); *Hughes v Howard* (1858) 25 Beav 575 (new lease after a collusive foreclosure); *Sims v Helling* (1851) 21 LJCh 76 (lease following a building agreement).

3 Eg a sale by the mortgagor's trustee in bankruptcy or a sale by the mortgagor to a purchaser against whom an unregistered charge is void: see *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223, [2002] 1 P & CR D1.

4 *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223, [2002] 1 P & CR D1.

5 *Re Biss, Biss v Biss* [1903] 2 Ch 40 at 62, CA; *Leigh v Burnett* (1885) 29 ChD 231; *Rakestraw v Brewer* (1729) 2 P Wms 511. Perpetually renewable leaseholds cannot now exist: see the Law of Property Act 1922 s 145, Sch 15 paras 1(1), 5; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 541.

6 *Nelson v Hannam* [1943] Ch 59, [1942] 2 All ER 680, CA.

7 le an order under the Law of Property Act 1925 s 146(4): see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 627.

8 *Chelsea Estates Investment Trust Co Ltd v Marche* [1955] Ch 328, [1955] 1 All ER 195.

9 le under the Leasehold Reform Acts 1967 and 1979: see the Leasehold Reform Act 1967 ss 8-13; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1389 et seq. A mortgage term is not capable of enfranchisement: *Re Fairview, Church Street, Bromyard* [1974] 1 All ER 1233, [1974] 1 WLR 579.

10 See PARA 673 et seq.

11 The mortgagor and mortgagee may, of course, agree to substitute the freehold for the lease as the security.

12 See the Leasehold Reform Act 1967 ss 14-16; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1481 et seq.

13 See the Leasehold Reform, Housing and Urban Development Act 1993 s 58(4); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1721. Cf also the cases cited in note 5.

14 See the Leasehold Reform Act 1967 s 14(6); the Leasehold Reform, Housing and Urban Development Act 1993 s 58(5); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARAS 1482, 1721.

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197. Compensation money.

If, on the compulsory acquisition of mortgaged land, a lump sum is paid into court by the acquiring authority in respect of the interests of the mortgagor and mortgagee, the court will apportion the amount between the mortgagor and mortgagee; usually, however, where the mortgagee is not in possession, the acquiring authority will treat with the mortgagor for the full value of the land, leaving him to discharge the mortgage¹. Special statutory provision is made entitling the acquiring authority to redeem the mortgagee's interest in the land, including provision for cases where the mortgage debt exceeds the value of the land or part only of the mortgaged land is taken².

Money paid as statutory compensation for the licence of a mortgaged public house belongs to the mortgagee as part of the mortgage security³.

1 See **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 711. See also the provisions relating to compensation in the Town and Country Planning Act 1990 ss 107-118, 144, 157, 186, 203-205, 282 (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 912 et seq); and the Leasehold Reform Act 1967 ss 1A, 1B, 9A (see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARAS 1443 et seq). See further **HOUSING** vol 22 (2006 Reissue) PARAS 417, 424.

2 See **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 712-714.

3 *Law Guarantee and Trust Society Ltd v Mitcham and Cheam Brewery Co Ltd* [1906] 2 Ch 98; *Noakes v Noakes & Co Ltd* [1907] 1 Ch 64; *Dawson v Braime's Tadcaster Breweries Ltd* [1907] 2 Ch 359.

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198. Business goodwill.

There are certain kinds of goodwill¹ to which a mortgagee is entitled. The goodwill which attaches to a particular house increases the value of that house, and therefore the mortgagee is entitled to it². A mortgage of premises comprised in a colliery lease which was subject to a condition that unless the seams of coal were worked the lessor might re-enter was held to charge the business³. Goodwill which arises from the personal reputation that a man has made for himself does not pass to the mortgagee of his house, but is a thing personal to the man whose skill and name acquired the goodwill⁴; nor will the goodwill of a business be included where the terms of the security indicate that only the business premises were intended to be charged⁵. A mortgagee of a public house and the goodwill is entitled, as against the mortgagor, to an assignment of the licence⁶.

1 As to goodwill generally see **PARTNERSHIP** vol 79 (2008) PARA 213 et seq; **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1206 et seq; **COMPETITION** vol 18 (2009) PARAS 373-376.

2 *Cooper v Metropolitan Board of Works* (1883) 25 ChD 472 at 479, CA. Thus mortgages of an upholsterer's business (*Chisum v Dewes* (1828) 5 Russ 29), of a baker's shop (*King v Midland Rly Co* (1868) 17 WR 113), of a graving dock (*Pile v Pile, ex p Lambton* (1876) 3 ChD 36, CA) and of a public house (*Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA) have been held to carry the goodwill.

3 *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA. Cf *Hamilton Gas Co Ltd v Hamilton Corp* [1910] AC 300, PC.

4 *Cooper v Metropolitan Board of Works* (1883) 25 ChD 472, CA.

5 *Whitley v Challis* [1892] 1 Ch 64, CA. See also *Palmer v Barclays Bank Ltd* (1971) 23 P & CR 30 (the mortgage charged merely the property; accordingly, the sale by the mortgagee of the premises without the goodwill of the business was held not to amount to negligence).

6 *Rutter v Daniel* (1882) 30 WR 724 (on appeal 30 WR 801, CA); *Re O'Brien* (1883) 11 LR Ir 213; *Garrett v St Marylebone, Middlesex Justices* (1884) 12 QBD 620. However, the mortgage does not include the proceeds of sale of rights under the licence: see *Re Carr* [1918] 2 IR 448.

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199. Insurance money.

All money received on an insurance of the mortgaged property effected under the Law of Property Act 1925, or for the maintenance of which the mortgagor is liable under the mortgage deed, must, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received¹. Upon the request of any person interested in or entitled to any house or other building burnt down or damaged by fire, the insurance office must apply the insurance money in reinstatement or repair², and it has been held that a claim for reinstatement may be made by a mortgagee³. On the other hand, and without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received under an insurance effected under the Law of Property Act 1925 be applied in or towards discharge of the money due under his mortgage⁴. However, if the mortgagor has effected a further insurance which is independent of the

security, the mortgagee will not be entitled to its benefit⁵; if the policy under which the mortgagee is entitled to benefit contains a clause limiting the insurers' liability in the event of the property in question being the subject of any other insurance, the result of the existence of the further insurance may be that the amount payable to the mortgagee is diminished⁶. If the policy is effected in the name of the mortgagee, he is entitled in law to payment of the proceeds but his interest remains by way of charge to secure the mortgage debt and he is accountable to subsequent mortgagees or the mortgagor for the surplus. If the policy is effected in the name of the mortgagor pursuant to a covenant to insure, the mortgagee has an interest in the proceeds by way of a partial equitable assignment which is not destroyed by the failure of the mortgagor to comply with any of his covenants intended to protect that interest⁷.

1 See the Law of Property Act 1925 s 108(3). As to the power to insure see PARA 227.

2 See the Fires Prevention (Metropolis) Act 1774 s 83 (which is not confined to the metropolis); *Portavon Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601 at 607; and **INSURANCE** vol 25 (2003 Reissue) PARA 637.

3 See **INSURANCE** vol 25 (2003 Reissue) PARA 639.

4 See the Law of Property Act 1925 s 108(4).

5 See *Halifax Building Society v Keighley* [1931] 2 KB 248; *Re Doherty* [1925] 2 IR 246.

6 *Halifax Building Society v Keighley* [1931] 2 KB 248. As to contribution clauses in insurance policies see **INSURANCE** vol 25 (2003 Reissue) PARAS 210-211.

7 *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand)* [1995] 3 All ER 987, [1995] 1 WLR 1140, PC.

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200. Mortgage indemnity policy.

Mortgagees commonly take out a mortgage indemnity policy with an insurance company under which the mortgagee is entitled to a specified sum on the happening of events such as a failure by the mortgagor to make payments, a sale by the mortgagee, and the proceeds of sale being less than the outstanding debt. The proceeds of the policy belong to the mortgagee and do not discharge any part of the debt owed by the mortgagor, even though the mortgagor is debited with the premium and the policy is described as additional security in the general conditions applicable to the mortgage¹.

1 *Woolwich Building Society v Brown* [1996] CLC 625; *Leeds Building Society v Banfield* [2007] EWCA Civ 1369, [2007] All ER (D) 302 (Dec).

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201. Other rights.

The benefit of some rights relating to the security, such as appurtenant easements and the benefit of restrictive covenants, pass automatically with the mortgage of the security¹. Other rights have to be expressly assigned².

1 See **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 125; **EQUITY** vol 16(2) (Reissue) PARA 601 et seq.

2 Eg the benefit of a covenant relating to the making of highways or roads (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 116), the benefit of the National House Builders Registration Council agreement (see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 193), and the benefit of some other positive covenant or obligation or a covenant for indemnity.

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C. MORTGAGES OF PARTICULAR KINDS OF LAND

202. Charge of registered land.

For the purpose only of preventing the title of a disponee being questioned, a person's right to exercise owner's powers in relation to a registered estate¹ is to be taken to be free from any limitation² affecting the validity of a disposition³. The grant of a legal charge⁴ is required to be completed by registration⁵ and does not operate at law until the registration requirements⁶ are met⁷. The entry is completed by entry on the charges register of the name of the chargee or his successor in title as proprietor of the charge⁸. On completion of the relevant registration requirements, a charge created by means of a registrable disposition⁹ of a registered estate has effect, if it would not otherwise do so, as a charge by deed by way of legal mortgage¹⁰.

A charge or mortgage which is not a registered charge takes effect only in equity¹¹ and is liable to be postponed to a registered disposition by the proprietor unless protected on the register by a notice¹².

1 As to owner's powers and the right to exercise them in relation to a registered estate see the Land Registration Act 2002 ss 23, 24; PARA 155. As to the meaning of 'registered estate' see PARA 159 note 7.

2 Ie any limitation other than a limitation reflected by an entry in the register of title (Land Registration Act 2002 s 26(2)(a)) or imposed by or under the legislation relating to the registration of land (s 26(2)(b)). Such limitations include, for example, limitations on dealing protected by a caution, inhibition or restriction entered under the Land Registration Act 1925: see the Land Registration Act 2002 s 134, Sch 12 paras 1, 2; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 993 et seq. As to the register of title and registration therein see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq.

3 See the Land Registration Act 2002 s 26(1), (3). See also **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 909.

4 As to the meaning of 'charge' see PARA 155 note 5.

5 See the Land Registration Act 2002 s 27(2)(f); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 912.

6 As to the registration requirements see **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 826 et seq, 1075 et seq.

7 See the Land Registration Act 2002 s 27(1); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 911.

8 Land Registration Act 2002 Sch 2 para 8.

9 As to the meaning of 'registrable disposition' see PARA 159 note 8.

10 Land Registration Act 2002 s 51.

11 See the Law of Property Act 1925 s 1(3).

12 See the Land Registration Act 2002 ss 28-30; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 934-936.

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203. Commonhold land.

The unit-holder of a commonhold unit¹ has owner's powers² to charge the whole interest in the unit; a charge cannot be created over part only of an interest in such a unit³ and an instrument or agreement is of no effect to the extent that it purports to create such a charge⁴.

A legal mortgage⁵ can be created over the common parts of a commonhold⁶ if the creation of the mortgage is approved by a resolution of the commonhold association⁷ passed unanimously⁸ before it is created⁹. It is not otherwise possible to create a charge over common parts¹⁰ and any instrument or agreement is of no effect to the extent that it purports to create such a charge¹¹.

1 A person is the unit-holder of a commonhold unit if he is entitled to be registered as the proprietor of the freehold estate in the unit (whether or not he is so registered): Commonhold and Leasehold Reform Act 2002 s 12. For these purposes, a 'commonhold unit' is a commonhold unit specified in a commonhold community statement in accordance with s 11: see s 11(1); and **COMMONHOLD** vol 13 (2009) PARA 330.

2 As to owner's powers see PARA 155.

3 See the Commonhold and Leasehold Reform Act 2002 s 22(1); and **COMMONHOLD** vol 13 (2009) PARA 351.

4 See the Commonhold and Leasehold Reform Act 2002 s 22(2); and **COMMONHOLD** vol 13 (2009) PARA 351.

5 As to the meaning of 'legal mortgage' see PARA 104 note 1; definition applied by the Commonhold and Leasehold Reform Act 2002 s 29(3).

6 I.e every part of the commonhold which is not for the time being a commonhold unit in accordance with the commonhold community statement: Commonhold and Leasehold Reform Act 2002 s 25(1).

7 Commonhold and Leasehold Reform Act 2002 s 29(1). As to commonhold associations see s 34(1), Sch 3; and **COMMONHOLD** vol 13 (2009) PARAS 305-306.

8 Commonhold and Leasehold Reform Act 2002 s 29(2)(a).

9 Commonhold and Leasehold Reform Act 2002 s 29(2)(b).

10 Commonhold and Leasehold Reform Act 2002 s 28(1).

11 See the Commonhold and Leasehold Reform Act 2002 s 28(2). See further s 28(3), (4); and **COMMONHOLD** vol 13 (2009) PARA 332.

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204. Incorporeal hereditaments.

Incorporeal hereditaments, such as manors, commons, rentcharges and other property of a like nature existing in gross and apart from the ownership of corporeal property, may be the subject of a mortgage; but only such incorporeal hereditaments as can exist at law¹ can be the subject of a legal mortgage. The mortgage is in the same form, so far as applicable, as in the case of other hereditaments², and if it is a legal mortgage it must be by deed³. The only profitable parts of a manor which may now exist are mining rights, franchises and sporting rights preserved on the statutory enfranchisement of copyholds⁴, and these may be the subject of a mortgage or included in a mortgage of the land with which they are held. An advowson⁵ is often appendant to a manor, but cannot now be mortgaged⁶. A right of common in gross is an independent subject of property⁷, but is seldom, if ever, met with as the subject of a mortgage. Grants of rentcharges can be mortgaged⁸.

1 See the Law of Property Act 1925 s 1(2); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 45.

2 'Land' includes a manor and a rent and other incorporeal hereditaments (see the Law of Property Act 1925 s 205(i)(ix); and PARA 104 note 2); and the provisions of the Act relating to freehold land apply to manors, perpetual rentcharges, and other incorporeal hereditaments, subject only to the qualifications necessarily arising by reason of the inherent nature of the hereditaments affected (see s 201(1) (amended by the Tithe Act 1936 s 48(3), Sch 9)). Thus the method of mortgaging by demise or by legal charge applies, so far as appropriate, to those hereditaments: see PARA 190 et seq.

3 For the statutory provisions rendering a deed necessary in the case of a legal mortgage of land (including an incorporeal hereditament) see PARA 192. As to the necessity of a deed at common law see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 10 et seq.

4 See **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq. See also **COMMONS** vol 13 (2009) PARA 556 et seq; **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 643.

5 As to advowsons generally see **ECCLESIASTICAL LAW** vol 14 PARA 776.

6 See the Benefices Act 1898 s 1(1)(b), (7) (repealed); the Law of Property Act 1925 s 201(2); and **ECCLESIASTICAL LAW** vol 14 PARA 802.

7 See **COMMONS** vol 13 (2009) PARA 431 et seq.

8 As to rentcharges see **RENTCHARGES AND ANNUITIES** vol 39(2) (Reissue) PARA 751 et seq. As to the general extinguishment of tithe rentcharge see **ECCLESIASTICAL LAW** vol 14 PARA 1213.

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205. Agricultural mortgages and charges.

The general law of mortgages and bills of sale applies to mortgages and charges of farms and stock¹. In addition, there are special provisions for short-term credit by way of charge in favour of a bank on farming stock².

1 As to the prohibition on excluding the mortgagor's leasing powers see PARA 347. As to the Agricultural Mortgage Corporation see **AGRICULTURAL LAND** vol 1 (2008) PARA 618.

2 See **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARAS 1328-1333.

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206. Mortgage of mines.

Mortgages of mineral property generally contain provisions similar to those inserted in mortgages of other descriptions of property of the like tenure¹. However, owing to the wasting nature of the property, it is usual to provide for the repayment by instalments of the sum advanced², or by the creation of a sinking fund³. It is also desirable to provide that, in case of default, the mortgagee may enter upon the property and work the mine and make all proper expenditure for that purpose⁴.

1 As to such general provisions see PARA 207 et seq. See also **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 311.

2 As to the effect of a provision for payment by instalments see PARA 211.

3 Similar provision may be made by means of a sinking fund policy.

4 In that case the mortgagee will on taking an account be allowed all proper expenditure, and, in redemption proceedings, will not be deprived of costs if he has refused to furnish an account at his own expense: *Norton v Cooper* (1854) 5 De GM & G 728. See also PARA 751. As to the rights of a mortgagee in possession to work mines see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 381. As to the power of a mortgagee to sell minerals separately from the surface see PARA 464.

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(iii) Provisions of a Legal Mortgage

A. PROVISIONS AS TO PRINCIPAL AND INTEREST

207. Main provisions.

The main provisions of a legal mortgage are: (1) a covenant to pay the principal debt and interest on a given date; (2) a covenant to pay interest in the event of default in payment of the principal on the day named; (3) the demise or sub-demise of, or the charge by way of legal mortgage on, the mortgaged property; (4) the proviso for cesser; and (5) such variations of the statutory provisions with regard to mortgages as the arrangement between the parties requires¹.

1 See PARA 208 et seq.

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208. Covenant for repayment.

The first operative part of a mortgage is usually the covenant by the mortgagor to pay the principal and interest on a day named¹. If there is no covenant and no accompanying bond, there is still an implied promise to pay² in the case of a mortgage created by the borrower. In the case of other third party securities whether or not a covenant to pay is implied depends on the construction of the agreement³. As every loan transaction implies a right to be repaid, if a person lending money is never to have his principal back, there must be something very definite and clear showing that such was the condition of the contract⁴.

The amount repayable may exceed the sum advanced, for example where a sum for interest is added to the principal as a premium⁵, or a commission is payable⁶, or the mortgage provides for a reasonable increase in the amount of the principal to take account of inflation⁷.

1 As to covenants by trustee mortgagors see PARA 179.

2 *Sutton v Sutton* (1882) 22 ChD 511 at 515, CA, per Jessel MR; *Scottish Equitable plc v Thompson* [2003] EWCA Civ 211, [2003] HLR 690; *Wilkinson v West Bromwich Building Society* [2004] EWCA Civ 1063, 148 Sol Jo LB 975 (affd on another point sub nom *West Bromwich Building Society v Wilkinson* [2005] UKHL 44, [2005] 4 All ER 97, [2005] 1 WLR 2303). See also *Ezekiel v Orakpo* [1997] 1 WLR 340 at 346, CA, per Millett LJ. It is, however, possible to agree that repayment will be made exclusively from a particular source: see *Levett v Barclays Bank plc* [1995] 2 All ER 615, [1995] 1 WLR 1260. As to implied terms generally see **CONTRACT** vol 9(1) (Reissue) PARA 778 et seq. As to covenants arising by construction see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 250 et seq. In the case of a charge registered under the Land Registration Act 1925, there was, in the absence of an entry on the register to the contrary, an implied covenant by the mortgagor to pay the sum secured: see s 28(1) (repealed). The registration of a charge which negated or modified the implied covenant was deemed a sufficient negative or contrary entry on the register: see the Land Registration Rules 1925, SR & O 1925/1093, r 140 (revoked).

3 *National Provincial Bank Ltd v Liddiard* [1941] Ch 158, sub nom *Re National Provincial Bank Ltd* [1941] 1 All ER 97; *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69, [1996] BCC 388, PC; *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL; *Fairmile Portfolio Management Ltd v Davies Arnold Cooper* [1998] 42 LS Gaz R 34, [1998] EGCS 149.

4 *Hopkins v Worcester and Birmingham Canal Proprietors* (1868) LR 6 Eq 437.

5 Cf *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166, [1967] 2 All ER 639.

6 As to bonus and commissions see PARA 321.

7 As to index-linking etc see *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; *Nationwide Building Society v Registry of Friendly Societies* [1983] 3 All ER 296, [1983] 1 WLR 1226.

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209. Date for repayment.

Fixing a day for payment does not generally indicate the parties' intention that actual payment is to be made on the named date, but only that the mortgagee may call for payment on or at any time after that date if so minded, but not before¹. The date fixed is usually six months from the date of the loan or deed, but may be at the end of three months or any other period, or the loan may be made repayable upon demand². In general, the mortgagor may not repay prior to the date fixed for repayment³.

1 As to a covenant to pay a loan on a fixed day in a named month, without stating the year see *Grannell v Monck* (1889) 24 LR Ir 241. A provision that a term loan is subject to normal banking terms and conditions does not make it repayable on demand: *Cryne v Barclays Bank* [1987] BCLC 548, CA.

2 As to the effect of such a covenant see PARA 538.

3 See PARA 329. As to cancellable regulated agreements under the Consumer Credit Act 1974 see ss 67-73; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 183 et seq. Those provisions do not apply to certain land mortgages: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 99 et seq.

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210. Length of notice required.

At common law, a covenant to pay the principal money immediately on demand¹ or immediately after notice implies such reasonable time as would allow the mortgagor to implement the mechanics of payment but not to raise the money if it is not available². If the demand is by a person representing himself to be the mortgagee's agent, the mortgagor is entitled to have time to inquire into the truth of the alleged agency³. If the loan is made by a lender acting for purposes relating to his business to a consumer⁴, a term which was not individually negotiated that enables the lender to terminate a loan facility of indeterminate duration on demand does not bind the borrower if it is an unfair term⁵. A term may be regarded as unfair if it enables the lender to terminate such a facility without reasonable notice except where there are serious grounds for doing so or unless there is a valid reason (in which case the lender is required to inform the borrower immediately)⁶.

1 As to whether such a covenant requires an actual demand see PARA 538.

2 *Brighty v Norton* (1862) 3 B & S 305; *Toms v Wilson* (1863) 4 B & S 442 (affd 4 B & S 455, Ex Ch); *Massey v Sladen* (1868) LR 4 Exch 13; *Re Burghardt, ex p Trevor* (1875) 1 ChD 297; *Cripps (Pharmaceuticals) Ltd v Wickenden* [1973] 2 All ER 606, [1973] 1 WLR 944; *Bank of Baroda v Panessar* [1987] Ch 335, [1986] 3 All ER 751. As to whether a term can be implied requiring the bank to give reasonable notice see *Williams & Glyn's Bank Ltd v Barnes* [1981] Com LR 205; *Cryne v Barclays Bank* [1987] BCLC 548, CA. See also *Lloyds Bank plc v Jeffrey Lampert* [1999] Lloyd's Rep Bank 136, [1998] 3 EGLR 109, CA.

3 *Moore v Shelley* (1883) 8 App Cas 285, PC; *Toms v Wilson* (1863) 4 B & S 442 (affd 4 B & S 455, Ex Ch).

4 As to the meaning of 'consumer' see PARA 229 note 1.

5 As to the meaning of 'unfair term' and for guidance as to how to assess whether a term is unfair see the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5; PARA 229.

6 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 paras 1(g), 2(a).

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211. Payment by instalments.

The principal may be made repayable by instalments with a stipulation that if the instalments and interest are duly paid the repayment of the principal is not to be otherwise enforced¹. Where the principal debt is agreed to be repayable by instalments, the parties' intention is assumed to be that the whole sum is to become immediately payable if default is made in regular payment of the instalments; and this is provided for either: (1) by a covenant to pay the principal sum at a given date, with a proviso that if the sum is to be paid by the instalments mentioned in it the lender will not require payment otherwise; or (2) by a direct covenant to pay by instalments, with a proviso that in case of default in payment of any instalment the whole debt is to become immediately payable². Such a proviso is not in the nature of a penalty and is binding³.

1 As to commissions and fines on default of repayment by instalments see PARA 733.

2 Where in case of default the whole debt becomes payable on demand, an actual demand is required: *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474.

3 *Strene v Beck* (1863) 1 De GJ & Sm 595; *Thompson v Hudson* (1869) LR 4 HL 1; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA; *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL; *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166, [1967] 2 All ER 639. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2013; **EQUITY** vol 16(2) (Reissue) PARA 803. See further PARA 554 et seq. A provision that interest for the full term would also be payable at once would however be a penalty: *Oresundsvarvet Aktiebolag v Marcos Diamantis Lemos, The Angelic Star* [1988] 1 Lloyd's Rep 122, [1988] CCLR 39, CA.

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212. Several mortgagees.

Where several persons advance money on mortgage, there is a presumption that the money belongs to them in severalty even though the mortgage was made to them as joint tenants¹. To obviate this, when trustees lend, it is usual to insert a statement that the money belongs to the lenders on a joint account². Money advanced by more persons than one is deemed, as between them and the mortgagor, to belong to the survivor either where the advance is expressly stated to be on a joint account, or where the security is made to persons jointly³, but this provision only applies if and so far as a contrary intention is not expressed in the mortgage⁴. An express mention of the joint account is not necessary, although it is convenient as a specific statement of the mortgagees' rights⁵.

A statement that the money belongs to the mortgagees on a joint account does not affect their rights among themselves if, in fact, they are entitled to the money as tenants in common⁶.

1 *Petty v Styward* (1631) 1 Eq Cas Abr 290; *Rigden v Vallier* (1751) 3 Atk 731 at 734; *Robinson v Preston* (1858) 4 K & J 505 at 511; *Steeds v Steeds* (1889) 22 QBD 537. See also **EQUITY** vol 16(2) (Reissue) PARA 557.

2 See PARA 181.

3 See the Law of Property Act 1925 s 111(1).

4 See the Law of Property Act 1925 s 111(2).

5 As to the discharge of securities in favour of joint mortgagees see PARA 639.

6 *Re Jackson, Smith v Sibthorpe* (1887) 34 ChD 732.

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213. Several mortgagors.

Where there are several mortgagors the mortgage may, depending on its construction, either secure only joint liabilities or secure the several liabilities of any of the mortgagors; and where the 'mortgagor' is defined as referring to all and/or any one of those persons and their obligation is expressed to be joint and several, all mortgagors are jointly and severally liable for the several liabilities of each of them¹.

¹ *AIB Group (UK) plc (formerly Allied Irish Banks plc and AIB Finance Ltd) v Martin* [2001] UKHL 63, [2002] 1 All ER 353, [2002] 1 WLR 94.

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214. Agreement not to call in the principal.

If a mortgage contains an unqualified stipulation that the principal money is not to be called in for a certain time, it is binding even if the interest falls into arrear, but in general the understanding of the parties is that such an indulgence is conditional upon punctual payment of the interest¹; and, upon an agreement for a mortgage with a stipulation that the principal is not to be called in for a given period, the mortgage must be framed to make postponement conditional upon punctual payment of interest². Where, under an agreement to forgo the right to call in the debt for a term if the interest is punctually paid, the interest is not paid punctually, the right to call in the principal accrues and there is no equitable relief³. The mortgagee does not merely by the subsequent receipt of interest waive his right to call in the principal before the end of the term⁴, although receipt of interest is a matter to be taken into account in determining whether there has been a waiver⁵.

¹ *Seaton v Twyford* (1870) LR 11 Eq 591. A mortgagor who is in arrears for only a day or two cannot take advantage of a clause stipulating that the loan is not to be called in so long as the interest is punctually paid: *Hicks v Gardner* (1837) 1 Jur 541; *Leeds and Hanley Theatre of Varieties v Broadbent* [1898] 1 Ch 343, CA.

² *Seaton v Twyford* (1870) LR 11 Eq 591 at 598 per Bacon V-C; *Burrowes v Molloy* (1845) 2 Jo & Lat 521 at 526; *Edwards v Martin* (1856) 25 LJCh 284; *Re Theobald, ex p Bignold* (1838) 3 Deac 151. See also *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43.

³ *Hicks v Gardner* (1837) 1 Jur 541; *Leeds and Hanley Theatre of Varieties v Broadbent* [1898] 1 Ch 343, CA. See also *MacLaine v Gatty* [1921] 1 AC 376, HL.

⁴ *Keene v Biscoe* (1878) 8 ChD 201.

⁵ *Seal v Gimson* (1914) 110 LT 583.

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215. Payment of interest.

The covenant fixing the date of payment generally provides for interest in the meantime¹. This is not, however, necessary in the case of simple interest², for a mortgage, whether legal or equitable, carries interest even if interest is not expressly reserved³ and even if it secures the debt of a third party who is not liable to pay interest to the creditor⁴. A power to charge an estate with a specific sum of money without mentioning interest includes a power to charge with interest⁵, and the right to interest is implied where a principal sum is charged on property by court order⁶. Where a security is given by way of indemnity, it will cover interest on sums paid by the guarantor⁷. This, however, does not apply if the instrument expressly provides for cesser on repayment of the principal only⁸. If it is intended that contractual interest should continue to be payable after judgment, express provision should be made to that effect⁹. A charge to secure the payment of principal and interest by a third party secures such interest as is payable by the third party, and is not limited to simple interest¹⁰.

1 As to the allowance of interest in taking accounts see PARA 723 et seq. As to restrictions on the increase of interest on certain mortgages to which the Rent Act 1977 applies see PARAS 528-529.

2 As to compound interest see PARA 217.

3 *Farquhar v Morris* (1797) 7 Term Rep 124; *Anon* (1813) 4 Taunt 876, Ex Ch; *Carey v Doyne* (1856) 5 I Ch R 104; *Re Every, ex p Hirtzel, ex p Hine* (1858) 3 De G & J 464; *Ashwell v Staunton* (1861) 30 Beav 52; *Re Kerr's Policy* (1869) LR 8 Eq 331; *Re King, ex p Furber* (1881) 17 ChD 191 at 196; *Re Drax, Savile v Drax* [1903] 1 Ch 781, CA; *Mendl v Smith* (1943) 112 LJCh 279; *Ezekiel v Orakpo* [1997] 1 WLR 340, CA. See also *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166 at 182, [1967] 2 All ER 639 at 648 per Goff J.

4 *Al-Wazir v Islamic Press Agency Inc* [2001] EWCA Civ 1276, [2002] 2 P & CR 157, [2002] 1 Lloyd's Rep 410.

5 *Lord Kilmurry v Geery* (1713) 2 Salk 538.

6 *Lippard v Ricketts* (1872) LR 14 Eq 291; *Stoker v Elwell* [1942] Ch 243, [1942] 1 All ER 261; *Ezekiel v Orakpo* [1997] 1 WLR 340, CA.

7 *Fergus' Executors v Gore* (1803) 1 Sch & Lef 107 at 109; *Wainman v Bowker* (1845) 8 Beav 363.

8 *Thompson v Drew* (1855) 20 Beav 49, distinguished in *Mendl v Smith* (1943) 112 LJCh 279.

9 See PARA 731.

10 *Whitbread plc v UCB Corporate Services Ltd* [2000] 3 EGLR 60, [2000] 35 EG 136, CA.

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216. Rate of interest.

Where a right to interest is implied, interest was formerly allowed at the annual rate of 4 or 5 per cent¹, but now would probably be allowed at a more realistic rate²; and in any event the court has general power to reopen extortionate credit agreements³. In other cases there is no restriction on the rate of interest which may be charged. Equity does not reform mortgage transactions merely because they are unreasonable⁴. If some other provision in the mortgage

relating to the interest could be set aside as an unreasonable collateral advantage, for example if all the interest calculated in advance became payable on early redemption, the court might, however, fix a lower rate of interest⁵.

An agreement for interest to be payable at a variable rate determined by the lender from time to time is lawful at common law⁶, but it is an implied term of the agreement that the rates of interest will not be set dishonestly, for an improper purpose, capriciously or arbitrarily, although that is not to imply a term that the lender will not set unreasonable rates⁷. It is also not a breach of such an implied term for a lender to increase rates in order to overcome his own financial difficulties⁸. If the loan is made by a lender acting for purposes relating to his business to a consumer⁹, a term permitting variation which was not individually negotiated does not bind the borrower if it is an unfair term¹⁰. A term permitting variation without notice may be regarded as unfair unless a valid reason is specified in the contract, and the lender is required to inform the borrower of any variation at the earliest opportunity and the borrower is free to dissolve the contract immediately¹¹.

In the absence of express provision in that behalf, the rate of interest may not be varied, although, if the money can be called in, this fact will usually be sufficient to make the borrower agree to a variation. Most building society and commercial mortgages provide for variation¹².

1 *Re Drax, Savile v Drax* [1903] 1 Ch 781, CA (4%); *Mendl v Smith* (1943) 112 LJCh 279 (5%). As to the rate of interest after judgment see PARA 731.

2 *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166, [1967] 2 All ER 639 (7%); *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455.

3 See the Consumer Credit Act 1974 ss 140A-140D; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 109, 269-270. See also the Insolvency Act 1986 s 343; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 672 et seq. Subsequent changes in rates of interest are not relevant to the question whether a credit agreement is extortionate (*Paragon Finance plc v Staunton* [2001] EWCA Civ 1466, [2002] 2 All ER 248, [2002] 1 WLR 685; *Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35, [2002] 1 All ER (Comm) 446), but failure of the lender to inform the borrower of a policy of operating the power to vary interest rates in a certain way, or not varying rates when market rates vary, could be relevant (*Broadwick Financial Services Ltd v Spencer*).

In the case of moneylenders there was formerly a presumption that interest was excessive where the annual rate exceeded 48% (see the Moneylenders Act 1927 s 10(1) (repealed)), but the court could nevertheless hold that the interest charged, even if less than that rate, was excessive.

4 *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441 at 457, [1938] 4 All ER 618 at 626, CA, per Sir Wilfrid Greene MR.

5 *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166, [1967] 2 All ER 639 (7% in place of 19% or, as a premium, 57%). See also *United Dominions Trust Ltd v Thomas* (1976) 120 Sol Jo 561 (county court).

6 *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918, 8 Tr LR 129, CA. See *Bank of Scotland v Ladjadj* [2000] 2 All ER (Comm) 583, CA (interpretation of terms in mortgage relating to option to pay interest at stabilised charging rate or fixed payment rate).

7 *Paragon Finance plc v Staunton* [2001] EWCA Civ 1466, [2002] 2 All ER 248, [2002] 1 WLR 685.

8 *Paragon Finance plc v Staunton* [2001] EWCA Civ 1466, [2002] 2 All ER 248, [2002] 1 WLR 685, at [46]-[48] per Dyson LJ.

9 As to the meaning of 'consumer' see PARA 229 note 1.

10 As to the meaning of 'unfair term' and for guidance as to how to assess whether a term is unfair see the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5; PARA 229.

11 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 paras 1(j), 2(b).

12 As to building societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856 et seq.

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217. Compound interest.

The mortgagor can validly agree to pay compound interest, and thus he can agree that interest in arrear is to be capitalised and is to bear interest at the same rate as the original advance¹. Compound interest does not, however, become capital: it retains its character as interest². However, the mortgagee may not charge compound interest except under an agreement to that effect³. The agreement may be either express or implied from the nature of the dealings⁴. A mere intimation by the mortgagee that he intends to charge compound interest is not enough; there must be assent by the mortgagor⁵, and assent by the mortgagor to the appropriation by the mortgagee as between capital and interest can be inferred from the facts⁶ where, for instance, the advances are made in the course of a trade or business in which compound interest is allowed⁷. Thus if the relation of bank and customer exists between mortgagee and mortgagor, and the mortgage is to secure a current account, the mortgagee is entitled to make up the account with yearly or half-yearly rests⁸, and charge future interest on the aggregate balance of principal and interest appearing at each rest⁹. The banker's right to compound interest continues until repayment of the debt or judgment, notwithstanding the account ceasing to be current¹⁰. Similarly, where partnership accounts have been kept on the footing of yearly or half-yearly rests, this method probably continues to be applicable on the dissolution of the partnership¹¹. The ordinary rule that receipts are first to be appropriated to payment of interest does not apply to such an account¹². Under a mortgage to a bank for a fixed sum, however, the accounts must be kept on the footing of simple interest¹³, unless otherwise agreed; although where the customer has settled accounts on the footing of compound interest, his executors may not be entitled to reopen them¹⁴. An agreement to pay interest on arrears existing at a certain date will be inferred where the interest has for a length of time been paid on an aggregate sum made up of the principal and those arrears¹⁵.

1 *Clarkson v Henderson* (1880) 14 ChD 348; *Re Craven's Mortgage, Davies v Craven* [1907] 2 Ch 448; *Re Morris, Mayhew v Halton* [1922] 1 Ch 126, CA. As to the position of a mortgagee in possession in this respect see PARA 219. As to compound interest see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1304. A capitalisation clause may prevent exercise of the power of sale on the ground that two months' interest is in arrears: see *Davy v Turner* (1970) 21 P & CR 967, 114 Sol Jo 884.

2 *IRC v Oswald* [1945] AC 360, [1945] 1 All ER 641, HL; *Whitbread plc v UCB Corporate Services Ltd* [2000] 3 EGLR 60, [2000] 35 EG 136, CA.

3 *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; *Daniell v Sinclair* (1881) 6 App Cas 181, PC; *Procter v Cooper* (1700) Prec Ch 116; *Brown v Barkham* (1720) 1 P Wms 652. Formerly an agreement in the mortgage for capitalising interest in arrear was void, as tending to usury (*Chambers v Goldwin* (1804) 9 Ves 254 at 271; *Mainland v Upjohn* (1889) 41 ChD 126 at 136), although, upon interest falling due, the parties might agree to turn it into principal (*Lord Ossulston v Lord Yarmouth* (1707) 2 Salk 449; *Thornhill v Evans* (1742) 2 Atk 330, where interest charged on arrears at a higher rate than that reserved was not allowed); and, accordingly, accounts might be settled half-yearly on this principle (*Ex p Bevan* (1803) 9 Ves 223; *Blackburn v Warwick* (1836) 2 Y & C Ex 92). The mortgagee may not, however, turn interest into principal against a subsequent incumbrancer of whose incumbrance he has notice: *Digby v Craggs* (1763) Amb 612. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2013.

4 *Tompson v Leith* (1858) 4 Jur NS 1091.

5 *Tompson v Leith* (1858) 4 Jur NS 1091.

6 *Yourell v Hibernian Bank Ltd* [1918] AC 372, HL.

7 *Morgan v Mather* (1792) 2 Ves 15 at 20.

8 The question whether more frequent rests are permitted by usage has not yet been decided: see *National Bank of Greece SA v Pinios Shipping Co* [1990] 1 AC 637, [1990] 1 All ER 78, HL, where it was conceded that compound interest with quarterly rests could be charged. See also *First National Bank plc v Syed* [1991] 2 All ER 250, [1991] CCLR 37, CA (monthly rests).

9 *Lord Clancarty v Latouche* (1810) 1 Ball & B 420; *Rufford v Bishop* (1829) 5 Russ 346; *Thomas v Cooper* (1854) 18 Jur 688 at 690; *Imperial Life Assurance Co of Canada v Efficient Distributors Ltd* [1992] 2 AC 85, [1992] 2 WLR 503, PC. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 968.

10 *National Bank of Greece SA v Pinios Shipping Co* [1990] 1 AC 637, [1990] 1 All ER 78, HL; *Bank of Credit and Commerce International SA v Malik* [1996] BCC 15.

11 See *National Bank of Greece SA v Pinios Shipping Co* [1990] 1 AC 637, [1990] 1 All ER 78, HL. Cf *Barfield v Loughborough* (1872) 8 Ch App 1 at 7.

12 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA.

13 *Mosse v Salt* (1863) 32 Beav 269; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413 at 424, PC. A mortgage for a fixed sum may be, however, in fact intended to cover a current account, and will so operate: *Thomas v Cooper* (1854) 18 Jur 688. See also PARA 728.

14 *Stewart v Stewart* (1891) 27 LR Ir 351 at 363.

15 *M'Carthy v Lord Llandaff* (1810) 1 Ball & B 375.

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218. Reduction of interest on punctual payment.

To induce punctual payment a proviso is often inserted for reduction of the rate of interest if the interest is paid within the time prescribed¹. Even an oral agreement to reduce the rate of interest stipulated for in a mortgage may be valid². An agreement for increasing the rate of interest on failure in punctual payment is, however, regarded as a penalty against which the courts will grant relief³ unless it provides only for a modest increase from the date of default⁴. A proviso for reduction is construed strictly, so that the mortgagor must pay the higher rate unless payment is made within the stipulated time⁵. Unpunctuality on one occasion will not, if the words of the covenant point to payment of interest on any occasion, deprive the mortgagor of the benefit of the proviso for the future⁶.

1 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 64.

2 *Lord Milton v Edgworth* (1773) 5 Bro Parl Cas 313, HL; *Gregory v Pilkington* (1856) 8 De GM & G 616; cf *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; but see also *Re Venning* (1947) 63 TLR 394 at 395, CA; and cf **ESTOPPEL** vol 16(2) (Reissue) PARA 1082 et seq.

3 *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 702, HL. See also **EQUITY** vol 16(2) (Reissue) PARA 802.

4 *Lordvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156. As to provisions for the payment of commission or fines in the event of default see PARA 733.

5 *Jory v Cox* (1701) Prec Ch 160; *Stanhope v Manners* (1763) 2 Eden 197; *Wayne v Lewis* (1855) 25 LTOS 264; *Nicholls v Maynard, ex p Marquis of Powis* (1747) 3 Atk 519; *Union Bank of London v Ingram* (1880) 16 ChD 53; *MacLaine v Gatty* [1921] 1 AC 376, HL.

6 *Stanhope v Manners* (1763) 2 Eden 197.

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219. Mortgagee in possession.

Where the proviso is for reduction of interest on punctual payment, a mortgagee in possession may charge the mortgagor with the higher rate even though he receives rent more than sufficient to pay the interest, and even though no interest was in arrear at the time of his taking possession¹. The receipt of rents by the mortgagee is not a payment by the mortgagor or by anyone on his behalf. The mortgagee receives rents which are his own, subject to the right of redemption²; but, under a proviso for the capitalisation of interest if it should be in arrear for 21 days, a mortgagee who enters into possession and has in his hands rents sufficient after deducting proper outgoings for payment of interest cannot claim that the interest is in arrear³.

1 *Union Bank of London v Ingram* (1880) 16 ChD 53; *Bright v Campbell* (1889) 41 ChD 388.

2 See *Cockburn v Edwards* (1881) 18 ChD 449 at 457, CA, per Jessel MR, and at 463 per Cotton LJ.

3 *Wrigley v Gill* [1906] 1 Ch 165, CA.

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220. Payment of interest after repayment date.

It is usual to insert in the mortgage a covenant for payment of the interest: this enables the interest to be sued for apart from the principal, although a separate covenant is not absolutely necessary for this purpose¹.

If the mortgage makes provision for payment of the principal on a day certain, with interest at a fixed rate down to that day, there is no implied contract for the continuance of interest at the same rate or at any rate at all after that day; but a stipulation in the mortgage that the mortgagor will not transfer the property until payment in full of principal and interest implies an agreement for the continuance of this original interest until payment². Interest is given in these cases, not as interest payable under the contract, but by way of damages for detention of the debt³.

The rate of interest given by way of damages was usually 5 per cent⁴, but the rate now given will presumably be the current rate of interest on damages which may be awarded by the High Court⁵.

In any case a distinct stipulation as to interest will be binding⁶.

1 *Dickenson v Harrison* (1817) 4 Price 282.

2 *Mathura Das v Raja Narinda Bahadur Pal* (1896) 12 TLR 609, PC.

3 *Cook v Fowler* (1874) LR 7 HL 27 at 32, 37; *Price v Great Western Rly Co* (1847) 16 M & W 244 at 248; *Re Roberts, Goodchap v Roberts* (1880) 14 ChD 49, CA; *Goldstrom v Tallerman* (1886) 18 QBD 1 at 4, CA.

4 *Re Roberts, Goodchap v Roberts* (1880) 14 ChD 49, CA; *Mellersh v Brown* (1890) 45 ChD 225. However, in *Morgan v Jones* (1853) 8 Exch 620 on a mortgage of a ship, the original interest of 10% was allowed. In *Gordillo v Weguelin* (1877) 5 ChD 287 at 303, CA, it was said that the jury would be directed as a matter of law to find damages at the rate of the original interest, but this is questionable. Cf *C and M Matthews Ltd v Marsden Building Society* [1951] Ch 758, [1951] 1 All ER 1053, CA, where the rate of interest was 82½%.

5 See the Senior Courts Act 1981 s 35A; and **DAMAGES** vol 12(1) (Reissue) PARA 848 et seq. See also *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166, [1967] 2 All ER 639. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

6 *Re King, ex p Furber* (1881) 17 ChD 191. As to the effect of a proviso limiting the amount to be recovered under a mortgage see PARA 726.

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B. PROVISIONS AS TO CESSER

221. Proviso for cesser or discharge.

In a legal mortgage by demise, the former proviso for redemption¹ has been replaced by a proviso for cesser. This provides that if the mortgagor on a given day pays to the mortgagee the debt and interest the mortgage term is to cease². In the case of a legal charge there is a similar proviso that on payment on the given day the mortgagee will duly discharge the security. Since in the former case the term ceases and in the latter case the legal charge is discharged by payment, the proviso for cesser and the proviso for discharge are not essential, but they are inserted in order to fix the end of the legal right of redemption³.

1 The proviso for redemption is, however, still appropriate where a mortgage of an equitable interest in land has been made by conveyance of that interest: see PARA 238.

2 The mortgagor's legal estate is therefore not directly affected.

3 As to the right of redemption see PARA 107.

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222. Restrictions on the right of redemption.

The mortgagor cannot generally compel the mortgagee to accept payment of the mortgage money before the day of payment appointed in the proviso for redemption¹. A stipulation in a mortgage that the principal debt is not to be called in for a given period is often accompanied by a corresponding stipulation that the mortgagor is not to be entitled without the mortgagee's consent to pay off or redeem the mortgage before the expiration of the period. Although the law will not allow a mortgagor to be precluded from redeeming altogether², he may be precluded from redeeming for a fixed period, such as five or seven years³; but this does not

prohibit the court in a proper case from preventing the application of the clause if it is too large or there are circumstances connected with the proviso which render it, in the court's opinion, unreasonable and oppressive⁴. A proviso against redemption for a period is not binding in the absence of a mutual provision for the continuance of the loan for that period⁵.

1 See PARA 329.

2 See PARAS 107, 317 et seq.

3 *Teevan v Smith* (1882) 20 ChD 724 at 729, CA; *Biggs v Hoddinott*, *Hoddinott v Biggs* [1898] 2 Ch 307 at 311, CA; *Bradley v Carritt* [1903] AC 253 at 259, HL. Although 'five or seven years' was mentioned as permissible in *Teevan v Smith*, eight years was allowed in *Re Hone's Estate* (1873) 8 IR Eq 65, and ten years in *Re Fortesque's Estate* [1916] 1 IR 268, CA. As to unreasonable periods see PARA 318.

4 *Biggs v Hoddinott*, *Hoddinott v Biggs* [1898] 2 Ch 307, CA; *Davis v Symons* [1934] Ch 442.

5 *Morgan v Jeffreys* [1910] 1 Ch 620.

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C. OTHER PROVISIONS

223. Covenants for title.

Certain covenants for title will be implied in a mortgage, in different terms according to when the mortgage was granted and the capacity of the mortgagor. In an instrument¹ effecting or purporting to effect a charge or mortgage² and expressed to be made with full or limited title guarantee, covenants are implied that the person making the disposition has the right, with the concurrence of any other mortgagor, to dispose of the property as he purports to do³ and that he will, at his own cost, do all that he reasonably can do to give the mortgagee the title he purports to give⁴. The benefit of the covenants goes with the estate or interest of the person to whom the disposition is made and is capable of being enforced by every person in whom that estate or interest is (in whole or in part) for the time being vested⁵. In the case of leasehold land, covenants will also be implied that the lease is subsisting at the time of the disposition⁶; that there is no subsisting breach of a condition or tenant's obligation and nothing which will render the lease liable to forfeiture⁷; and that the mortgagor will fully and promptly observe and perform all obligations under the lease or any rentcharge to which the property is subject⁸. If the property is a commonhold unit⁹, there is implied a covenant that the mortgagor will fully and promptly observe and perform all the obligations under the commonhold community statement¹⁰ that are for the time being imposed on him in his capacity as a unit-holder¹¹ or as a joint unit-holder¹².

In an instrument effecting or purporting to effect a charge or mortgage and expressed to be made with full title guarantee, covenants are also implied that the mortgagor is creating the mortgage free from all charges and incumbrances and free from all rights exercisable by third parties other than any charges, incumbrances or rights which the mortgagor does not and could not reasonably be expected to know about and certain statutory charges which do not constitute defects in title¹³. Where only a limited title guarantee is given, there is implied a covenant that the mortgagor has not, since the last disposition for value, created any charge or incumbrance or granted any third party rights which subsist at the time of the mortgage, and that the mortgagor has not suffered anyone else to do so and is not aware that anyone else has done so¹⁴.

Such covenants do not impose liability if and in so far as they are expressly limited or excluded, in respect of any matter to which the mortgage is made subject or for anything which is within the actual knowledge of the mortgagee or which is a necessary consequence of facts within his actual knowledge¹⁵.

In a deed of statutory mortgage¹⁶ or of statutory transfer of mortgage¹⁷, made by two or more mortgagors or covenantors, the implied covenant is deemed to be a joint and several covenant by them; and where there are two or more mortgagees or transferees, the implied covenant is deemed to be with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which case the implied covenant is deemed to be a covenant with each severally, in respect of the share or distinct sums secured to him¹⁸.

1 'Instrument' includes an instrument which is not a deed: Law of Property (Miscellaneous Provisions) Act 1994 s 1(4). As to what constitutes a deed see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 1 et seq.

2 The Law of Property (Miscellaneous Provisions) Act 1994 applies to dispositions of property. 'Disposition' includes the creation of a term of years; and 'property' includes a thing in action, and any interest in real or personal property: s 1(4).

3 The mortgagor is presumed to purport to dispose of the whole of the registered title or, in the case of unregistered property, the fee simple or unexpired term, as the case may be: see the Law of Property (Miscellaneous Provisions) Act 1994 s 2(3); and **SALE OF LAND** vol 42 (Reissue) PARA 350.

4 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 1(2), 2; and **SALE OF LAND** vol 42 (Reissue) PARAS 349-350. This has been the case since 1 July 1995 (ie the date on which the substantive provisions of the Law of Property (Miscellaneous Provisions) Act 1994 were brought into force by the Law of Property (Miscellaneous Provisions) Act 1994 (Commencement No 2) Order 1995, SI 1995/1317).

In a mortgage created before 1 July 1995 by a mortgagor conveying as beneficial owner, the covenants implied were for the right to convey, for quiet enjoyment after default, for freedom from incumbrances, and for further assurance; and in the case of a mortgage of leasehold property, the further covenants were that the lease was valid and that the rents and covenants had been paid and performed, and for the indemnity of the mortgagee in respect of the rents and covenants in the future: Law of Property Act 1925 s 76(1)(C), (D), Sch 2 Pts III, IV (repealed). No covenants were implied where the person conveying was not expressed to convey in one of the capacities mentioned in the Law of Property Act 1925 s 76 (repealed), which include that of mortgagee: s 76(4) (repealed). The implied covenants are normally deemed to have been made by the mortgagor or each mortgagor, as regards the subject matter or share of subject matter expressed to be mortgaged by him, with the person, if one, to whom the mortgage was made, or with the persons jointly, if more than one, to whom the mortgage was made: see s 76(1) (repealed). The benefit of the covenants was to go with the covenantor's estate or interest and was capable of being enforced by every person in whom that estate or interest was, for the whole or any part thereof, from time to time vested: see s 76(6) (repealed). The implied covenants were variable or extendable by the mortgage deed and, once so varied or extended, would, as far as may be, operate, in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed by statute to be implied: see s 76(7) (repealed). A person joining in the assurance, but having no beneficial interest in the property, conveys as trustee or as mortgagee, and this will only imply a covenant against incumbrances to which he has been a party: s 76(1)(F), Sch 2 Pt VI (repealed). In the Law of Property Act 1925, 'incumbrance' includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum; and 'incumbrancer' has a corresponding meaning and includes every person entitled to the benefit of an incumbrance or to require its payment or discharge: s 205(1)(vii). As to the meaning of 'legal mortgage' see PARA 104 note 1; and as to the meaning of 'equitable mortgage' see PARA 105. Section 76 and Sch 2 were repealed as regards dispositions of property made after 1 July 1995, subject to transitional provisions for mortgages made pursuant to contracts entered into before that date, by the Law of Property (Miscellaneous Provisions) Act 1994 ss 10(1), (2), 21(2), (3), Sch 2.

As to implied covenants in relation to dispositions of land see further **SALE OF LAND** vol 42 (Reissue) PARA 338 et seq. As to the effect of the implied covenants in the case of registered land see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 967 et seq.

5 Law of Property (Miscellaneous Provisions) Act 1994 s 7.

6 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 1(2), 4(1)(a); and **SALE OF LAND** vol 42 (Reissue) PARAS 349-350.

7 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 1(2), 4(1)(b); and **SALE OF LAND** vol 42 (Reissue) PARAS 349-350.

8 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 1(2), 5(2), (3); and **SALE OF LAND** vol 42 (Reissue) PARAS 349-350. This has been the case since 1 July 1995: see note 4.

9 As to the meaning of 'commonhold unit' see PARA 203 note 1; definition applied by the Law of Property (Miscellaneous Provisions) Act 1994 s 5(4)(a) (s 5(3A), (4)(a) added by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 7(1), (3), (4)).

10 As to commonhold community statements see **COMMONHOLD** vol 13 (2009) PARA 311; definition applied by the Law of Property (Miscellaneous Provisions) Act 1994 s 5(4)(a) (as added: see note 9).

11 As to the meaning of 'unit-holder of a commonhold unit' see PARA 203 note 1; definition applied by the Law of Property (Miscellaneous Provisions) Act 1994 s 5(4)(a) (as added: see note 9).

12 Law of Property (Miscellaneous Provisions) Act 1994 s 5(3A) (as added: see note 9). Two or more persons are joint unit-holders of a commonhold unit if they are entitled to be registered as proprietors of the freehold estate in the unit (whether or not they are registered): Commonhold and Leasehold Reform Act 2002 s 13; applied by the Law of Property (Miscellaneous Provisions) Act 1994 s 5(4)(a) (as added: see note 9).

13 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 1(2), 3(1), (2); and **SALE OF LAND** vol 42 (Reissue) PARA 350. This has been the case since 1 July 1995: see note 4.

14 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 1(2), 3(3); and **SALE OF LAND** vol 42 (Reissue) PARA 351. This has been the case since 1 July 1995: see note 4.

15 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 6, 8; and **SALE OF LAND** vol 42 (Reissue) PARAS 350-351.

16 See the Law of Property Act 1925 s 117(1); and PARA 192.

17 See the Law of Property Act 1925 s 118(1); and PARA 374.

18 See the Law of Property Act 1925 s 119.

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224. Power of sale.

An important incident of a mortgage is the power to sell the property in default of payment of the debt. An express power is seldom now inserted, reliance being placed upon the statutory power¹. The statutory power may be, and is frequently, varied or extended, and it applies to the mortgage only so far as a contrary intention is not expressed in the mortgage deed².

1 See the Law of Property Act 1925 s 101(1)(i); and PARA 443.

2 See the Law of Property Act 1925 s 101(3), (4); and PARA 443 et seq.

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225. Repair.

There is no statutory obligation on a mortgagor to keep the premises in repair. Provision upon the subject should be made where the nature of the property so requires¹.

1 As to a mortgagor's liability for waste see PARA 358. As to his position as tenant see PARA 341; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 427 et seq.

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226. Powers to grant leases and accept surrenders.

A mortgage frequently imposes restrictions upon the exercise of the mortgagor's statutory powers to grant leases¹ and accept surrenders of leases², by providing that the powers are not to be exercised without the mortgagee's written consent. In general, the statutory powers apply only so far as a contrary intention is not expressed in the mortgage, and may be extended by written agreement between the parties³.

1 As to such powers see the Law of Property Act 1925 s 99; and PARA 346 et seq.

2 As to such powers see the Law of Property Act 1925 s 100; and PARA 352.

3 See the Law of Property Act 1925 s 99(13), (13A), (13B), s 14, s 100(7), (10); and PARAS 347, 352, 354.

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227. Insurance.

A mortgage deed usually includes a covenant to insure the security. A mortgagee¹ by deed has power² at any time after the date of the deed to insure, and keep insured, against fire any building, effects or property of an insurable nature comprised in the mortgage³, and the premiums paid are a charge on the mortgaged property, in addition to the mortgage money, with the same priority and so as to carry interest at the same rate as the mortgage money⁴. The amount of the insurance effected must not exceed the amount specified in the mortgage deed, or, if no amount is so specified, must not exceed two-thirds of the amount that would be required, in case of total destruction, to restore the property insured⁵. No insurance is to be effected where there is a declaration in the mortgage deed that no insurance is required⁶; nor where an insurance is kept up by or on behalf of the mortgagor⁷ in accordance with the mortgage deed⁸; nor where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor with the consent of the mortgagee, to the amount to which the mortgagee is authorised⁹ to insure¹⁰.

1 As to the meaning of 'mortgagee' see PARA 104 note 1.

2 As regards a mortgagee having an insurable interest see **INSURANCE** vol 25 (2003 Reissue) PARA 612.

3 As to the meaning of 'mortgage' see PARA 101 note 4.

- 4 Law of Property Act 1925 s 101(1)(ii). As to the meaning of 'mortgage money' see PARA 104 note 1. The premiums are only a charge on the property, and cannot be recovered from the mortgagor as a debt, so the practice continues of inserting a covenant for their repayment in the mortgage deed.
- 5 Law of Property Act 1925 s 108(1). As to the application of insurance money see PARA 199.
- 6 Law of Property Act 1925 s 108(2)(i).
- 7 As to the meaning of 'mortgagor' see PARA 104 note 1.
- 8 Law of Property Act 1925 s 108(2)(ii).
- 9 ie by the Law of Property Act 1925.
- 10 Law of Property Act 1925 s 108(2)(iii).

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228. Attornment clause.

Sometimes an attornment clause is inserted when the mortgagor is himself in occupation of all or any part of the mortgaged property, but such a clause is of dubious value¹.

- 1 See PARA 343.

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D. UNFAIR CONTRACT TERMS IN MORTGAGES GRANTED BY CONSUMERS

229. In general.

A mortgage term which has not been individually negotiated¹ is regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations under the mortgage to the detriment of the mortgagor²; and if an overall assessment of a mortgage contract indicates that it is a pre-formulated standard contract, the statutory provisions protecting consumers against unfair contractual terms³ will apply to all parts of it even if a specific term or certain aspects of it have been individually negotiated⁴. Those provisions impose limitations as regards the construction of written terms⁵ and the unfairness of terms which have not been individually negotiated⁶. In so far, however, as it is in plain, intelligible language⁷, no assessment is to be made of the fairness of any term which relates to the definition of the main subject matter of the contract⁸ or which concerns the adequacy of the price or remuneration as against the services supplied⁹.

- 1 A term will always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer (ie, in this case, the mortgagor) has therefore not been able to influence the substance of the term: Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(2).

'Consumer' means any natural person who, in contracts covered by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, is acting for purposes which are outside his trade, business or profession: reg 3(1). A borrower who took out a mortgage for both business and personal purposes was capable of being a consumer for the purposes of the regulations: see *Evans v CherryTree Finance Ltd* [2008] EWCA Civ 331, [2008] All ER (D) 86 (Feb).

2 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(1). As to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, and the scope of their application, see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq. For an indicative and non-exhaustive list of the contractual terms which may be regarded as unfair for these purposes see reg 5(5), Sch 2; and **CONTRACT** vol 9(1) (Reissue) PARA 794.

3 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

4 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(3).

5 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 7; and **CONTRACT** vol 9(1) (Reissue) PARA 792.

6 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 6, 8; and **CONTRACT** vol 9(1) (Reissue) PARAS 793-796.

7 As to the requirement to express written terms in plain, intelligible language see the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 7(1); and **CONTRACT** vol 9(1) (Reissue) PARA 792.

8 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 6(2)(a); and **CONTRACT** vol 9(1) (Reissue) PARA 791.

9 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 6(2)(b); and **CONTRACT** vol 9(1) (Reissue) PARA 791.

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230. Consequences of inclusion of unfair terms in contracts.

An unfair term¹ in a mortgage contract concluded with a consumer² by a seller or supplier³ is not binding on the consumer⁴, although the contract continues to bind the parties if it is capable of continuing in existence without the unfair term⁵.

1 As to the terms to which these provisions apply see PARA 229; and **CONTRACT** vol 9(1) (Reissue) PARAS 793-796.

2 As to the meaning of 'consumer' see PARA 229 note 1.

3 'Seller or supplier' means any natural or legal person who, in contracts covered by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned: reg 3(1). As to the contracts covered by the regulations see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq.

4 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8(1).

5 Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8(2).

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(2) LEGAL MORTGAGES OF PERSONALTY

(i) In general

231. Personal chattels.

Personal chattels may be made security for repayment of a debt in two ways, namely by pledge¹ or by mortgage². If a mortgage of personal chattels is in writing it is subject to the statutory provisions affecting bills of sale³, but such a mortgage may be made orally and need not be in writing⁴. A parol mortgage of chattels, completed by actual delivery, is not within the statutory provisions affecting bills of sale⁵, and the terms of the mortgage may be proved by oral evidence⁶. A parol mortgage, even without delivery, is good at common law, although as the chattels then remain in the debtor's order and disposition the mortgagee has no priority over the general creditors upon the debtor's bankruptcy⁷. Mortgages of ships and aircraft, debentures of incorporated companies and certain agricultural charges are excluded from the operation of the statutory provisions affecting bills of sale⁸.

1 As to the distinction between a mortgage and a pledge see PARA 112.

2 As to the effect of the Consumer Credit Act 1974 see PARA 115.

3 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1620 et seq. As to the meaning of 'personal chattels' for these purposes see the Bills of Sale Act 1878 ss 4, 5; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1662-1664. As to floating charges of companies see **COMPANIES** vol 15 (2009) PARA 1269 et seq.

4 Co Litt 225 a, 226a; *Reeves v Capper* (1838) 5 Bing NC 136; *Flory v Denny* (1852) 7 Exch 581.

5 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1639.

6 Cf *Woodgate v Godfrey* (1879) 5 ExD 24, CA; *North Central Wagon Co v Manchester, Sheffield and Lincolnshire Rly Co* (1887) 35 ChD 191 at 203, CA.

7 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

8 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1684, 1688-1690. As to mortgages of ships see PARA 246. As to mortgages of aircraft see PARA 248.

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232. Choses or things in action.

Debts and other legal choses or things in action may be the subject of legal mortgages¹. The statutory provisions affecting bills of sale do not apply to mortgages of things in action².

1 Eg life insurance policies (see PARAS 233-236) or stocks and shares (see PARA 237). As to legal choses in action see **CHOSSES IN ACTION** vol 13 (2009) PARA 3.

2 See the Bills of Sale Act 1878 s 4; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1662. As to charges created by companies see **COMPANIES** vol 15 (2009) PARA 1256 et seq.

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(ii) Life Insurance Policies

233. Covenants for title.

The security for a mortgage of a life insurance policy normally contains express covenants¹ for whatever acts the mortgagee requires the mortgagor to perform or abstain from. The covenants by the mortgagor which are usually inserted are not to permit the policy to become void, and if it becomes void to effect a new policy in lieu of it; and to pay the premiums and deliver receipts to the mortgagee. It is also usual to insert a provision that the mortgagee may keep the policy on foot in case the mortgagor neglects to do so, and that the money advanced for that purpose is to be a charge on the policy. Even without such an express provision, the mortgagee is entitled to charge the property with any sums he may advance for keeping up the policy².

1 As to implied covenants for title see PARA 223.

2 *Bellamy v Brickenden* (1861) 2 John & H 137; *Gill v Downing* (1874) LR 17 Eq 316.

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234. Priority of mortgages.

The mortgagee of a life insurance policy may sue in his own name¹. Notice of the mortgage must, however, be given to the insurance office, and the dates on which several notices are received will regulate the priority of all claims under different assignments². A letter by a debtor enclosing a policy on his life and requesting the creditor to instruct his solicitor to prepare the necessary assignment³, or a memorandum accompanying a deposit of a policy by which the borrower agrees to execute a valid mortgage upon request⁴, are not assignments for this purpose⁵. A second mortgagee with notice of a first mortgage does not, however, gain priority over the first mortgagee by giving the first notice to the insurance company⁶; and non-production of the policy to the second mortgagee affects him with constructive notice of the first mortgage⁷.

1 See the Policies of Assurance Act 1867 s 1; and **INSURANCE** vol 25 (2003 Reissue) PARAS 548-551. The provisions of the Policies of Assurance Act 1867 are not affected by the Law of Property Act 1925 s 136: see s 136(2); and **INSURANCE** vol 25 (2003 Reissue) PARA 548.

2 See the Policies of Assurance Act 1867 s 3; and **INSURANCE** vol 25 (2003 Reissue) PARA 549.

3 *Crossley v City of Glasgow Life Assurance Co* (1876) 4 ChD 421.

4 *Spencer v Clarke* (1878) 9 ChD 137.

5 See for the purposes of the Policies of Assurance Act 1867 s 1.

6 *Newman v Newman* (1885) 28 ChD 674.

7 *Spencer v Clarke* (1878) 9 ChD 137; *Re Weniger's Policy* [1910] 2 Ch 291.

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235. Power of sale.

The statutory power of sale conferred on mortgagees applies to mortgages by deed of policies and other choses or things in action¹.

¹ As to the statutory power of sale see PARA 443 et seq.

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236. Ownership of the policy.

When an insurance policy is taken out by the creditor on the debtor's life as part of his security, and the premiums are paid by the debtor or charged against him in account, or if it is agreed or can be inferred from the bargain between the parties that the debtor has undertaken to pay the premiums, then the policy, or the balance of the insurance money after discharge of the debt, belongs to the debtor¹. If the debtor is charged with the premiums in account with the creditor and has not disputed his liability to pay them, his refusal to pay the premiums will not destroy his right to the policy². However, if a mortgagee of an annuity or other property which depends upon a life insures the mortgagor's life merely for his own protection, paying the premiums out of his own pocket, the policy belongs to the mortgagee³; and the mere fact that the creditor has charged the premiums against the debtor without the debtor having agreed to pay them does not give the debtor a right to the policy⁴.

¹ *Holland v Smith* (1806) 6 Esp 11; *Morland v Isaac* (1855) 20 Beav 389; *Re Storie's Will Trusts* (1859) 1 Giff 94; *Lea v Hinton* (1854) 5 De GM & G 823; *Courtenay v Wright* (1860) 2 Giff 337; *Salt v Marquess of Northampton* [1892] AC 1 at 16, HL. As to ownership of joint policies see *Davitt v Titcumb* [1990] Ch 110, [1989] 3 All ER 417; *Smith v Clerical Medical and General Life Assurance Society* [1992] 1 FCR 262, [1993] 1 FLR 47, CA.

² *Drysdale v Piggott* (1856) 8 De GM & G 546. See also **INSURANCE** vol 25 (2003 Reissue) PARA 559.

³ *Gottlieb v Cranch* (1853) 4 De GM & G 440; *Re Jacob's Estate*, *Lancaster v Gaselee*, *ex p Lancaster* (1851) 4 De G & Sm 524; *Preston v Neele* (1879) 12 ChD 760. For the analogous case of a mortgage indemnity policy see PARA 200.

⁴ *Bruce v Garden* (1869) 5 Ch App 32.

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(iii) Stocks and Shares

237. Mortgage of stocks and shares.

A mortgagee's legal title to stocks and shares in a public company is given by a transfer and due registration of the stocks or shares in the mortgagee's name¹. The mortgagor's interest in the shares cannot be noted on the register of members², but the transfer is generally accompanied by an independent document setting forth the actual nature of the security and providing for a re-transfer on redemption. In this case the mortgagee becomes a member of the company³ and is liable for calls if the shares are not fully paid up, but, if the mortgage is under seal, he has a statutory power of sale⁴. Where shares are transferable only by deed⁵ and the deed of transfer is invalid, registration of the transferee does not give him any title⁶; nor does he acquire a legal title until all the conditions required by the articles of association of the company have been fulfilled to give him, as between himself and the company, a present, absolute and unconditional right to have the transfer registered⁷.

1 As to the transfer of shares see **COMPANIES** vol 14 (2009) PARA 389 et seq. As to the inclusion of a power of attorney in a mortgage of shares in a private company see *Hunter v Hunter* [1936] AC 222 at 248, HL, per Viscount Hailsham LC. As to the effect of a blank transfer see PARA 244.

2 No notice of any trust, express, implied or constructive, is to be entered on the register, or receivable by the registrar in the case of companies registered in England and Wales: see the Companies Act 2006 s 126; and **COMPANIES** vol 14 (2009) PARA 343.

3 See *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964, [1962] 1 All ER 201.

4 See the Law of Property Act 1925 ss 101, 103; and PARA 443 et seq.

5 As to the form and execution of transfers see **COMPANIES** vol 14 (2009) PARA 399 et seq.

6 *France v Clark* (1884) 26 ChD 257, CA; *Hare v London and North-Western Rly Co* (1860) John 722. As to the effect on a transfer of a mis-statement of the consideration or an erroneous stamp see *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 560, CA. See also **COMPANIES** vol 14 (2009) PARA 401. As to a person obtaining a title against the company by estoppel arising from the issue of a certificate see **COMPANIES** vol 14 (2009) PARA 387.

7 *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 28, HL; *Roots v Williamson* (1888) 38 ChD 485; *Moore v North Western Bank* [1891] 2 Ch 599; *Nanney v Morgan* (1887) 35 ChD 598 (affd 37 ChD 346, CA). As to the articles of association of a company see **COMPANIES** vol 14 (2009) PARA 228 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(3) EQUITABLE MORTGAGES AND CHARGES/238. Form of equitable mortgage.

(3) EQUITABLE MORTGAGES AND CHARGES

238. Form of equitable mortgage.

The kinds of equitable mortgage which may be made¹, and the requirement that a mortgage of an equitable interest in land² or a mortgage of an equitable interest subsisting at the time of the mortgage³ must be in writing, are discussed elsewhere in this title. A mortgage of an equitable interest in land can be made by assignment of the equitable interest, subject to a proviso for redemption⁴. Mortgages of equitable interests in personalty are not required to be in any particular form. The principle that the priority of mortgages of personalty and of equitable interests in land depends upon notice is considered elsewhere in this title⁵.

1 See PARA 105.

2 See PARA 118 et seq. As to the principle that mortgages of life interests and reversionary interests must take the form of equitable mortgages see PARA 189.

3 See PARA 142.

4 The restrictions on the creation of mortgages by assignment apply only to mortgages of the legal estate: see the Law of Property Act 1925 ss 85, 86; and PARA 190 et seq.

5 See PARA 267 et seq. As to debentures of companies see **COMPANIES** vol 15 (2009) PARA 1299 et seq. As to floating charges of companies see **COMPANIES** vol 15 (2009) PARA 1269 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(3) EQUITABLE MORTGAGES AND CHARGES/239. Agreement to charge.

239. Agreement to charge.

An agreement to charge real or personal estate, made for valuable consideration¹ by a person who has power to create such a charge, operates as a valid equitable charge², even though the charge extends to all his existing property³; and if, at the date of the agreement, the property agreed to be charged has been sold, the charge takes effect on the interest which the person making it has in the purchase money⁴. A covenant to charge property ascertained or ascertainable creates a binding charge as soon as the property is ascertained⁵. It is sufficient if the land can be ascertained by existing facts and circumstances⁶. A valid agreement to charge will be held effectual notwithstanding any mistake which may have occurred in the attempt to effect it⁷.

A simple agreement or covenant to charge land where no land in particular is mentioned will not create a charge, neither will an agreement for a personal security with power to call for a real one, nor is a charge created where it otherwise appears that the intention was to rely on the covenant⁸.

1 A voluntary agreement to give a charge is not enforceable: *Re Earl of Lucan, Hardinge v Cobden* (1890) 45 ChD 470. See also **EQUITY** vol 16(2) (Reissue) PARA 642.

2 *Rolleston v Morton* (1842) 1 Dr & War 171 at 195; *Whitworth v Gaugain* (1844) 3 Hare 416 at 424; *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 ChD 128 at 134, CA.

3 *Re Kelcey, Tyson v Kelcey* [1899] 2 Ch 530. As to charges extending to the whole of the mortgagor's property see generally PARA 103.

4 *Re Selby, ex p Rogers* (1856) 8 De GM & G 271.

5 *Metcalfe v Archbishop of York* (1836) 1 My & Cr 547; *Ravenshaw v Hollier* (1834) 7 Sim 3 (affd (1835) 4 LJCh 119); cf *Legard v Hodges* (1792) 1 Ves 477.

6 *Montagu v Earl of Sandwich* (1886) 32 ChD 525 at 538, CA, per Cotton LJ. See also *Lyde v Mynn* (1833) 1 My & K 683; *Watson v Sadleir* (1829) 1 Mol 585; and **LIEN** vol 68 (2008) PARAS 878-879.

7 *Re Strand Music Hall Co Ltd, ex p European and American Finance Corp'n Ltd* (1865) 3 De GJ & Sm 147; *Ross v Army and Navy Hotel Co* (1886) 34 ChD 43, CA; *Re Queensland Land and Coal Co, Davis v Martin* [1894] 3 Ch 181.

8 *Fremoult v Dedire* (1718) 1 P Wms 429; *Williams v Lucas* (1789) 2 Cox Eq Cas 160; *Collins v Plummer* (1708) 1 P Wms 104; *Berrington v Evans* (1839) 3 Y & C Ex 384.

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240. Imperfect mortgage treated as equitable mortgage.

An instrument which fails to comply with the formalities for a legal charge¹ is treated as, and must comply with the formalities required for the creation of, an equitable mortgage², rather than as an equitable charge³.

1 As to the formalities for a legal charge see PARA 191.

2 As to equitable mortgages see PARA 105. As to the formalities required see PARA 118.

3 *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; and see *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA. See also *Parker v Housefield* (1834) 2 My & K 419; *Carter v Wake* (1877) 4 ChD 605; *Harrold v Plenty* [1901] 2 Ch 314; *Ex p Wright* (1812) 19 Ves 255 at 258; *Pryce v Bury* (1853) 2 Drew 41; *Featherstone v Fenwick* (1784) 1 Bro CC 270n. As to equitable charges see PARA 106.

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241. Equitable charges.

An equitable charge on land or an interest in land must be in writing signed by the chargor or his agent¹. An instrument which constitutes an agreement to create an equitable charge or formal mortgage is unenforceable unless it either complies with the formalities for an equitable mortgage of land or gives rise to a constructive trust². An equitable charge may be created where a mortgagor purports to mortgage a greater estate in property than that which he possesses³.

1 See the Law of Property Act 1925 s 53(1)(c); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24; **EQUITY** vol 16(2) (Reissue) PARA 642. See also *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1995] 2 All ER 973; affd on different grounds [1997] Ch 107, [1996] 3 All ER 215, CA. It is unclear whether such a charge also needs to comply with the formalities for an equitable mortgage of land: see *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] 2 P & CR D9, [2005] All ER (D) 229 (May); and the text to note 2.

2 *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] 2 P & CR D9, [2005] All ER (D) 229 (May). As to the requirements for the creation of a valid equitable mortgage see *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA; and PARA 118.

3 See PARA 194.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(3) EQUITABLE MORTGAGES AND CHARGES/242. Charging orders.

242. Charging orders.

A charging order made in favour of a judgment creditor¹ over an asset of the debtor has the like effect and is enforceable in the same manner as an equitable charge created by the debtor by

writing under his hand². The Land Charges Act 1972 and the Land Registration Act 2002 apply in relation to charging orders as they apply in relation to other orders or writs issued or made for the purposes of enforcing judgments³. In the case of unregistered land, a charging order over the legal estate is registrable but not over a beneficial interest alone⁴. It seems that such a charge takes effect subject to any prior mortgages, whether legal or equitable, affecting the estate or interest charged⁵. In the case of registered land, a charging order may be protected by notice in the same circumstances as apply in the case of unregistered land⁶, the priority of such a charge being governed by the general rules relating to interests affecting registered land⁷.

A charging order is enforceable by sale⁸ or the appointment of a receiver⁹ in the same way as an equitable charge.

1 See pursuant to the Charging Orders Act 1979. As to the manner of obtaining a charging order, and the circumstances in which, and the assets over which, it may be made see **CIVIL PROCEDURE** vol 12 (2009) PARA 1467 et seq. As to the discharge of a charging order see PARA 328. The enforcement of a charging order is not subject to loss through being time barred: see *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156, [2009] 2 All ER (Comm) 164, [2009] 1 P & CR 345; and PARA 515.

2 See the Charging Orders Act 1979 s 3(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1480. As to priority of charging orders see also PARA 291.

3 See the Charging Orders Act 1979 s 3(2) (amended by the Land Registration Act 2002 s 133, Sch 11 para 15); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1481.

4 See the Land Charges Act 1972 s 6(1), (1A); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 654. See also *Perry v Phoenix Assurance plc* [1988] 3 All ER 60, [1988] 1 WLR 940.

5 *Whitworth v Gaugain* (1846) 1 Ph 728; *Legg v Mathieson* (1860) 2 Giff 71; *Kinderley v Jervis* (1856) 22 Beav 1; *Eyre v M'Dowell* (1861) 9 HL Cas 619; *Wickham v New Brunswick and Canada Rly Co* (1865) LR 1 PC 64; *Chung Khiaw Bank Ltd v United Overseas Bank* [1970] AC 767, [1970] 2 WLR 858, PC.

6 See the Land Registration Act 2002 s 34; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 998-999.

7 As to these rules see the Land Registration Act 2002 ss 28-30; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 934-936.

8 See CPR 73.10; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482. As to orders for sale generally see PARA 616 et seq. A judgment creditor holding a charging order over a beneficial interest in land may apply under the Trusts of Land and Appointment of Trustees Act 1996: see s 14; and **TRUSTS** vol 48 (2007 Reissue) PARA 1038. See also **REAL PROPERTY** vol 39(2) (Reissue) PARAS 67, 216.

9 See the Senior Courts Act 1981 s 37; the County Courts Act 1984 s 107; CPR Pt 69; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1498, 1501; **RECEIVERS** vol 39(2) (Reissue) PARAS 313, 315. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(3) EQUITABLE MORTGAGES AND CHARGES/243. Hire purchase and conditional sale.

243. Hire purchase and conditional sale.

A mere equitable mortgagee does not gain priority over a hire purchase or conditional sale agreement in respect of the chattels comprised in the agreement¹.

1 *Re Samuel Allen & Sons Ltd* [1907] 1 Ch 575; *Re Morrison, Jones and Taylor Ltd, Cookes v Morrison, Jones and Taylor Ltd* [1914] 1 Ch 50, CA. See also *Hamer v London, City and Midland Bank Ltd* (1918) 87 LJKB 973. As

to hire purchase and conditional sale agreements generally see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 93, 95.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(3) EQUITABLE MORTGAGES AND CHARGES/244. Blank transfers of stocks and shares.

244. Blank transfers of stocks and shares.

Where stocks or shares can be transferred only by deed, a blank transfer does not in itself provide any security to the mortgagee¹ as an instrument containing blanks is not a deed². The mortgagee should obtain authority from the mortgagors to fill in the blanks and deliver the transfer as a deed³. Where, however, transfers are not required to be by deed, an equitable mortgagee has an implied authority to complete the transfer for the purpose of perfecting his security⁴.

1 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 980; **COMPANIES** vol 14 (2009) PARA 401. As to the simplified transfer of certain registered securities by means of a stock transfer see the Stock Transfer Act 1963 s 1(2); and **COMPANIES** vol 14 (2009) PARA 400.

2 As to the delivery of deeds see *Longman v Viscount Chelsea* [1989] 2 EGLR 242, 58 P & CR 189, CA; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 37, 40. The instrument may, however, afford evidence that any deposit of share certificates accompanying it was by way of security: *Colonial Bank v Whinney* (1886) 11 App Cas 426 at 433, HL. As to share certificates generally see **COMPANIES** vol 14 (2009) PARA 381 et seq. As to the effect of a deposit of share certificates see PARA 112.

3 The authority to fill in the blanks is usually given by means of a power of attorney executed as a deed, although this is no longer necessary: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(c).

4 See PARA 112. As to the circumstances in which a person who hands over document of title to an agent may be bound by the agent's acts see PARA 284. See also **COMPANIES** vol 14 (2009) PARA 401; **EQUITY** vol 16(2) (Reissue) PARA 569.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(3) EQUITABLE MORTGAGES AND CHARGES/245. Equitable mortgagee of shares.

245. Equitable mortgagee of shares.

Where a share certificate is deposited without any memorandum, the lender's remedy is an order for transfer and foreclosure¹. This remedy may be available even though the personal remedy against the mortgagor is barred by statute². Even where the certificate itself is deposited, the equitable mortgagee is not in a safe position, as the mortgagor may be able to obtain a fresh certificate and enable another mortgagee to obtain registration of a transfer, or may subject the shares to a lien having priority over the equitable mortgage³, or the shares, if not fully paid up, may become liable to be forfeited⁴.

1 *Harrold v Plenty* [1901] 2 Ch 314.

2 *London and Midland Bank v Mitchell* [1899] 2 Ch 161, which was decided at a time when there was no limitation period applicable to proceedings for the foreclosure of a mortgage of personal property. A 12 year period is now applicable to such a claim: see **LIMITATION PERIODS** vol 68 (2008) PARA 1124. However, it seems that the principle laid down in this case still applies where the 12 year period has not elapsed, but the six year

period which, in the case of a mortgage not by deed, applies to the personal remedy against the mortgagor has elapsed: cf **LIMITATION PERIODS** vol 68 (2008) PARA 1105.

3 *Bradford Banking Co v Briggs, Son & Co Ltd* (1886) 12 App Cas 29, HL; *Champagne Perrier-Jouet SA v HH Finch Ltd* [1982] 3 All ER 713, [1982] 1 WLR 1359. As to the effect of a lien for debts incurred after a company has notice of a charge on debts see **COMPANIES** vol 15 (2009) PARA 1208.

4 See **COMPANIES** vol 15 (2009) PARA 1213 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(4) MORTGAGES OF SHIPS, FREIGHT, AIRCRAFT AND HOVERCRAFT/246. Mortgages of ships.

(4) MORTGAGES OF SHIPS, FREIGHT, AIRCRAFT AND HOVERCRAFT

246. Mortgages of ships.

Mortgages of ships are governed by statute and are considered elsewhere in this work¹.

1 See the Merchant Shipping Act 1995 s 16, Sch 1; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 318 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(4) MORTGAGES OF SHIPS, FREIGHT, AIRCRAFT AND HOVERCRAFT/247. Mortgage of freight.

247. Mortgage of freight.

Frequently a statutory mortgage of a ship is accompanied by an independent collateral mortgage by the statutory owner of the freight earnings and the policies of insurance on the ship¹. With regard to those interests, it is not necessary to comply with the statutory provisions to make a valid security, but the mortgagee should complete his security by giving notice to the persons by whom the freight is payable².

The rights of a statutory mortgagee of a ship to freight, and priorities between such a mortgagee and an assignee of freight, are considered elsewhere in this work³.

1 As to mortgages of ships see PARA 246.

2 *Mestaer v Gillespie* (1805) 11 Ves 621 at 629; *Davenport v Whitmore* (1836) 2 My & Cr 177; *Gardner v Lachlan* (1838) 4 My & Cr 129; *Langton v Horton* (1842) 1 Hare 549.

3 As to the rights of a statutory mortgagee of a ship to freight see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 332; **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 580-583, 588. As to the priorities between a statutory mortgagee of a ship and an assignee of freight see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 334.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(4) MORTGAGES OF SHIPS, FREIGHT, AIRCRAFT AND HOVERCRAFT/248. Mortgages of aircraft and hovercraft.

248. Mortgages of aircraft and hovercraft.

A duly registered¹ aircraft or hovercraft², or such an aircraft or hovercraft with any store of spares for it, may be made security for a loan or other valuable consideration³. Provision is made for the registration of any such mortgage⁴. Whilst registration is voluntary, there is an inducement to register because a registered mortgage has priority over an earlier unregistered mortgage⁵. Mortgages of registered aircraft which would otherwise need to be registered as bills of sale⁶ are exempt from the statutory provisions relating to bills of sale⁷, although mortgages of unregistered aircraft remain subject to those provisions where appropriate⁸.

A mortgage made by a company is registrable under the Companies Act 2006⁹.

1 Is registered in the register maintained under the Civil Aviation Act 1982 s 60 and the Air Navigation Order 2005, SI 2005/1970, art 3 (see **AIR LAW** vol 2 (2008) PARA 366 et seq); see the Mortgaging of Aircraft Order 1972, SI 1972/1268, art 2(2).

2 Whilst hovercraft rank as ships for most purposes, they rank as aircraft for mortgage purposes: see the Hovercraft (Application of Enactments) Order 1972, SI 1972/971, art 5, Sch 2 Pt A (which, by virtue of the Interpretation Act 1978 ss 17(2)(a), 23(2), applies the Civil Aviation Act 1982 s 86, and hence the Mortgaging of Aircraft Order 1972, SI 1972/1268, to hovercraft). See also the Hovercraft Act 1968 s 1(1)(h), s 1(3); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 382. As to the meaning of 'hovercraft' see s 4(1); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 381.

3 See the Mortgaging of Aircraft Order 1972, SI 1972/1268, art 3; and also **AIR LAW** vol 2 (2008) PARA 431.

4 See the Mortgaging of Aircraft Order 1972, SI 1972/1268, arts 4-13; and **AIR LAW** vol 2 (2008) PARA 431. As to false statements and forgery in connection with registration see art 17; and **AIR LAW** vol 2 (2008) PARA 431. As to the right of any person who suffers loss by reason of an error or omission in the register to indemnification see art 18; and **AIR LAW** vol 2 (2008) PARA 431.

5 See the Mortgaging of Aircraft Order 1972, SI 1972/1268, art 14; and **AIR LAW** vol 2 (2008) PARA 432; **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1689.

6 See PARA 231.

7 Is the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see the Mortgaging of Aircraft Order 1972, SI 1972/1268, art 16(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1689.

8 As to unregistered aircraft see **AIR LAW** vol 2 (2008) PARA 367.

9 See the Companies Act 2006 s 860; and **COMPANIES** vol 15 (2009) PARA 1279.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(5) CONSUMER CREDIT SECURITIES/249. Securities under the Consumer Credit Act 1974.

(5) CONSUMER CREDIT SECURITIES

249. Securities under the Consumer Credit Act 1974.

The Consumer Credit Act 1974 contains provisions as to the form and content of documentation and the enforcement of transactions in relation to regulated agreements¹.

1 As to the provisions of the Consumer Credit Act 1974 generally see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 78 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(6) SUB-MORTGAGES/250. Form of sub-mortgage.

(6) SUB-MORTGAGES

250. Form of sub-mortgage.

Where the principal mortgage is a legal mortgage of land¹ by demise or sub-demise², a legal sub-mortgage may be effected either by sub-demise for a term that is at least one day shorter than the principal mortgage term or by a charge by deed expressed to be by way of legal mortgage³. A sub-mortgage which purports to be by way of assignment of the principal mortgage term takes effect by way of sub-demise but is subject to cesser on redemption⁴. Where the principal mortgage is other than a mortgage by demise or sub-demise, a sub-mortgage may be effected by a transfer of the benefit of the principal mortgage subject to a proviso for redemption⁵. An equitable sub-mortgage may be created in writing but no longer by deposit of deeds alone⁶. Before completing a sub-mortgage the lender should inquire from the original mortgagor as to the actual amount due on the mortgage and should give him notice of the sub-mortgage⁷.

1 As to the meaning of 'land' see PARA 104 note 2.

2 See PARA 190.

3 See the Law of Property Act 1925 s 86(1), (3); and PARA 190. See also **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906 et seq. In practice, in such a case the sub-mortgage will contain a covenant to pay principal and interest due under the sub-mortgage, a transfer of the principal mortgage debt, a sub-demise or legal charge of the mortgaged property and a provision for cesser or redemption.

4 See the Law of Property Act 1925 s 86(2), (3); and PARA 188.

5 As to the principle that a deed is necessary for a legal mortgage of land or an interest in land see PARA 192. As to the necessity for writing for the disposition of an equitable interest see PARAS 118, 139.

6 See PARAS 118, 131. A memorandum by way of equitable sub-mortgage given by the transferee of a registered bill of sale, accompanied by deposit of the bill of sale and transfer, does not require registration as a bill of sale: see *Re Parker, ex p Turquand* (1885) 14 QBD 636, CA; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1832.

7 See PARA 131.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(6) SUB-MORTGAGES/251. Sub-mortgage of registered land.

251. Sub-mortgage of registered land.

Because a registered proprietor¹ or a person entitled to be registered as a proprietor is entitled to exercise owner's powers², and since those powers in relation to a registered charge³ consist of power to make a disposition of any kind permitted by the general law in relation to an interest of that description (other than a legal sub-mortgage)⁴ and power to charge at law with the payment of money indebtedness secured by the registered charge⁵, a sub-mortgage of registered land can be made only by way of a charge on the indebtedness secured by the registered charge⁶. The registered proprietor of a sub-charge⁷ has, in relation to the property subject to the principal charge or any intermediate charge, the same powers as the sub-chargor⁸.

1 le a person who is entered in the register of title: Land Registration Act 2002 s 132(1). As to the register of title and registration therein see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq.

2 See the Land Registration Act 2002 s 24(a), (b); PARA 155; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 908.

3 As to the meaning of 'charge' see PARA 155 note 5; and as to the meaning of 'registered charge' see PARA 159 note 7.

4 See the Land Registration Act 2002 s 23(2)(a).

5 Land Registration Act 2002 s 23(2)(b).

6 See the Land Registration Act 2002 ss 23(2), 24. See further **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 907, 908.

7 'Sub-charge' means a charge under the Land Registration Act 2002 s 23(2)(b) (see the text to note 5): s 132(1).

8 Land Registration Act 2002 s 53.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(6) SUB-MORTGAGES/252. Obligation to sue.

252. Obligation to sue.

On a mortgage of a debt, however secured, the mortgagee should be relieved from any obligation to sue for, or require payment of, the debt or any part of it, or to take any steps for that purpose, unless he thinks fit, and from any liability for loss occasioned by his omission to do so¹.

1 See *Ex p Mure* (1788) 2 Cox Eq Cas 63; *Williams v Price* (1824) 1 Sim & St 581. As to the right of a sub-mortgagee to prove in the administration of the assets of the deceased mortgagor see *Re Burrell, Burrell v Smith* (1869) LR 7 Eq 399.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(6) SUB-MORTGAGES/253. Effect of sub-mortgage by transfer.

253. Effect of sub-mortgage by transfer.

During its continuance, a sub-mortgage by transfer will place the sub-mortgagee in the position of a transferee of the original mortgage because a deed of transfer operates to transfer the original mortgage debt, the benefit of all securities for it and the mortgagee's estate in the mortgaged property¹. The transfer of the benefit of all securities includes the power of sale, and this suspends the original mortgagee's power of sale during the continuance of the sub-mortgage². Subject to any stipulations contained in the sub-mortgage, the sub-mortgagee may call in the original mortgage, and may exercise the mortgagee's right to sue for and receive the mortgage money and to realise the security; and the mortgagee, as he is responsible to the sub-mortgagee for the debt due to the sub-mortgagee, may require him to sue for the mortgage debt³. If the sub-mortgagee receives the mortgage money, he must reconvey to the mortgagor, and, after satisfying his own debt, must account for the surplus to the mortgagee⁴. If he realises the mortgage security by exercising the power of sale arising under the

mortgage, he must set aside the amount due under that mortgage and pay the surplus to the mortgagor⁵; and out of the amount so set aside he must retain the sub-mortgage debt and pay the remainder to the mortgagee⁶.

1 See the Law of Property Act 1925 s 114; and PARA 365. In relation to registered land, s 114 takes effect only in equity: see *Paragon Finance plc v Pender* [2003] EWHC 2834 (Ch) at [121], [2003] All ER (D) 346 (Nov) at [121] per Peter Smith J (affd on appeal [2005] EWCA Civ 760, [2005] 1 WLR 3412, (2005) Times, 19 July).

2 *Cruse v Nowell* (1856) 25 LJCh 709. As to the power of sale see PARAS 224, 440 et seq; and as to application of the statutory power of sale see PARA 443.

3 Cf *Gurney v Seppings* (1846) 2 Ph 40; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1129 et seq.

4 See the Law of Property Act 1925 ss 105, 107(2); PARA 472; and **TRUSTS** vol 48 (2007 Reissue) PARA 616. As to the application of proceeds of sale by a building society see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2027.

5 See PARA 472.

6 See the Law of Property Act 1925 ss 105, 107(2); and **TRUSTS** vol 48 (2007 Reissue) PARA 616.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(6) SUB-MORTGAGES/254. Effect of sub-charge by demise or legal charge.

254. Effect of sub-charge by demise or legal charge.

A sub-charge creates a new mortgage term of 3000 years less one day, rather than effecting a transfer of the original mortgage term¹. Whether a sub-charge by demise or legal charge effects a transfer of the rights under the principal charge depends on the terms of the sub-charge². If the principal mortgagee retains his estate he can take possession notwithstanding the transfer of the right to collect the debt and the grant of the sub-charge; if a sub-charge is granted on terms that it is enforceable only after the sub-chargee has made demand, he has no right to possession on the grant of the sub-charge³.

1 *Credit and Mercantile plc v Marks* [2004] EWCA Civ 568, [2005] Ch 81, [2004] 3 WLR 489, at [29]-[48] per Clarke LJ (citing *Owen v Cornell* (1967) 203 Estates Gazette 29, and the effect of the Law of Property Act 1925 ss 86(1), 87(1)(b) (see PARAS 190-191) combined).

2 *Owen v Cornell* (1967) 203 Estates Gazette 29; *Credit and Mercantile plc v Marks* [2004] EWCA Civ 568, [2005] Ch 81, [2004] 3 WLR 489, at [35] per Clarke LJ.

3 *Credit and Mercantile plc v Marks* [2004] EWCA Civ 568, [2005] Ch 81, [2004] 3 WLR 489.

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255. Exercise of power of sale.

If the assistance of the court is necessary for a sale, and the original mortgage is to secure an unascertained amount, an account must first be taken of what is due on it¹. Where a bankrupt mortgagee has purchased the equity of redemption², a sub-mortgagee by deposit is entitled to

a sale of the bankrupt's entire interest³. There may also be a power of sale incident to the sub-mortgage⁴, but the exercise of this does not affect the mortgagor. The sub-mortgagee, in pursuance of this power, transfers the mortgage so as to extinguish the mortgagee's equity of redemption, and accounts for the surplus proceeds to the mortgagee; but the mortgagor's equity of redemption continues to exist, and the purchaser under the power of sale holds the mortgaged property subject to it⁵.

1 *Re Wright, ex p Mackay* (1841) 1 Mont D & De G 550.

2 As to the equity of redemption see PARA 302 et seq.

3 *Re Watts, ex p Tuffnell* (1834) 4 Deac & Ch 29. As to an order for sale on the application of an equitable sub-mortgagee in the mortgagee's bankruptcy see *Re Vaughan, ex p Powell* (1847) De G 405. As to the effect of insolvency see PARA 517 et seq. It is no longer possible to create a sub-mortgage by deposit alone: see PARAS 118, 131.

4 As to the power of sale see PARAS 224, 440 et seq; and as to application of the statutory power of sale see PARA 443 et seq. As to the effect of conveyance by a sub-mortgagee see PARA 449.

5 See note 4.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(6) SUB-MORTGAGES/256. Sub-mortgagee takes subject to outstanding equities.

256. Sub-mortgagee takes subject to outstanding equities.

As the sub-mortgagee is in the position of a transferee of the mortgage, he takes, like any other transferee, subject to the accounts between the mortgagor and the mortgagee at the date of the sub-mortgage¹, and he will be affected by dealings between the mortgagor and mortgagee until the mortgagor has had notice of the sub-mortgage². The mortgagor's receipt for the mortgage money, incorporated in the mortgage or indorsed on it, is, however, usually conclusive in favour of the sub-mortgagee that the original mortgage money was in fact advanced³.

1 See *Norrish v Marshall* (1821) 5 Madd 475; *Cockell v Taylor* (1851) 15 Beav 103; *De Lisle v Union Bank of Scotland* [1914] 1 Ch 22, CA. See also PARA 380.

2 *Reeve v Whitmore, Martin v Whitmore* (1863) 4 De GJ & Sm 1 at 19.

3 As to the amount originally advanced see PARA 381.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/3. CREATION OF MORTGAGES AND CHARGES/(6) SUB-MORTGAGES/257. Sub-mortgage of securities.

257. Sub-mortgage of securities.

By implication of law, a mortgagee of securities has the right to sub-mortgage the securities to the extent of his own interest in them without an express agreement to that effect¹. Any attempt to sub-mortgage beyond that extent is, however, inoperative, except where negotiable securities are taken in good faith and for value² or where the sub-mortgagee has otherwise

acquired a good legal title, and the original mortgagor can recover the securities from the sub-mortgagee upon payment of the amount due from him upon them³.

1 *Donald v Suckling* (1866) LR 1 QB 585; *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273; *France v Clark* (1884) 26 ChD 257, CA; *Mocatta v Bell* (1857) 24 Beav 585.

2 *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168.

3 *Donald v Suckling* (1866) LR 1 QB 585; *France v Clark* (1884) 26 ChD 257, CA; *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL. Cf *Re Burge, Woodall & Co, ex p Skyrme* [1912] 1 KB 393.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/4. PRIORITY OF MORTGAGES/(1) PRIORITY BETWEEN MORTGAGEES OF LAND/258. In general.

4. PRIORITY OF MORTGAGES

(1) PRIORITY BETWEEN MORTGAGEES OF LAND

258. In general.

The principles which applied before 1926 with respect to the priorities of legal and equitable mortgages of, and other interests in, land¹ were not abrogated by the Law of Property Act 1925², and that Act does not affect any question arising out of or consequent upon any omission to obtain or any other absence of possession by any person of documents relating to a legal estate in land³. A mortgagee taking a legal estate still has priority over an earlier equitable incumbrance of which he had no notice when he made his advance⁴, and a legal mortgagee may by his conduct in relation to the deeds either lose his priority over an earlier equitable incumbrance or be postponed to a subsequent incumbrance⁵. The operation of these rules is, however, largely modified by the statutory provisions with respect to the registration of land⁶ and, in the case of unregistered land, the registration of puisne mortgages, equitable mortgages and general equitable charges, such registration being deemed to constitute actual notice⁷.

1 See PARAS 282-286.

2 See *Beddoes v Shaw* [1937] Ch 81, [1936] 2 All ER 1108. See also PARA 262.

3 Law of Property Act 1925 s 13. As to the meaning of 'legal estate' see PARA 105 note 2. As to the meaning of 'land' see PARA 104 note 2.

4 See PARA 263.

5 See PARA 283.

6 As to the registration of land see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 801 et seq. The statutory provisions do not, however, affect: (1) priorities between unregistered charges created before 13 October 2003 (ie the date on which the substantive provisions of the Land Registration Act 2002, and the corresponding repeals of the Land Registration Act 1925, were brought into force by the Land Registration Act 2002 (Commencement No 4) Order 2003, SI 2003/1725) which are still governed by the rule that the first in time prevails (see *Mortgage Corp Ltd v Nationwide Credit Corp Ltd* [1994] Ch 49 at 56, [1993] 4 All ER 623 at 628, CA, per Dillon LJ); (2) priority between mortgages of equitable interests created before 13 October 2003 which are still governed by the rule in *Dearle v Hall* (1828) 3 Russ 1 (see PARA 267 et seq); or (3) the right of the mortgagor to set aside the mortgage procured by the wrongdoing of the debtor, where the mortgagee must rely on the defence of bona fide purchaser for value without notice (see PARA 147 et seq).

7 See the Law of Property Act 1925 s 198(1); the Land Charges Act 1972 s 2(1), (4)(i), (iii); and PARAS 260-261, 276. In certain circumstances, however, the Law of Property Act 1925 s 198(1) must be disregarded: see the Law of Property Act 1969 ss 24, 25; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 617; **SALE OF LAND** vol 42 (Reissue) PARA 54. Thus a general equitable charge (without the deeds) should be registered as a land charge. If it is followed by a legal mortgage (with or without the deeds), the legal mortgagee will have actual notice of it, and cannot gain priority by his legal estate. If the general equitable charge is not registered, it will be void against the legal mortgagee, and he will not have to rely on his legal estate. If the deeds are in the hands of an equitable incumbrancer, the equitable incumbrance need not be registered as a land charge (see PARA 260), but a subsequent legal mortgagee may still be postponed by reason of his negligence in inquiring for them (see PARA 282), and, unless he registers his mortgage as a puisne mortgage, it will be void as against a subsequent incumbrancer. If the legal mortgagee, having obtained the deeds, parts with them, except to some person who holds them on his behalf exclusively, it is possible that his mortgage becomes a puisne mortgage, and unless he registers it as a land charge it may be void against a subsequent incumbrancer whether the subsequent incumbrancer obtains the deeds or not: see the Land Charges Act 1972 s 4(5); and PARA 261. Thus it may be necessary sometimes to resort to the principles which determined priorities before 1926, but in general priorities depend on the statutory provisions which came into operation on 1 January 1926.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/4. PRIORITY OF MORTGAGES/(1) PRIORITY BETWEEN MORTGAGEES OF LAND/259. Charges of registered land.

259. Charges of registered land.

The statutory provisions for the registration of land charges¹ do not apply to charges if and so far as they affect registered land and can be protected under the enactments relating to registered land².

The priority of an interest, such as a charge, affecting a registered estate or charge³ is not affected by a disposition of the estate or charge⁴, save that if a registrable disposition⁵ of a registered estate or charge is made for valuable consideration⁶, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate or charge immediately before the disposition whose priority is not protected at the time of registration⁷.

Registered charges on the same registered estate, or on the same registered charge, are to be taken to rank as between themselves in the order shown in the register⁸.

1 I.e. the Land Charges Act 1972: see PARA 260.

2 See the Land Charges Act 1972 s 14; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 605.

3 As to the meanings of 'registered estate' and 'registered charge' see PARA 159 note 7.

4 See the Land Registration Act 2002 s 28(1); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 934. This is the case whether or not the interest or disposition is registered: see s 28(2); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 934.

5 As to the meaning of 'registrable disposition' see PARA 159 note 8.

6 As to the meaning of 'valuable consideration' see PARA 159 note 9.

7 See the Land Registration Act 2002 ss 29(1), 30(1); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 935-936. For these purposes, the priority of an interest or charge is protected in any case if it is a registered interest or charge or is the subject of a notice on the register, or if it is an overriding interest falling within Sch 3 which has not been the subject of a notice in the register at any time since 13 October 2003 (i.e. the date on which ss 29, 30 were brought into force by the Land Registration Act 2002 (Commencement No 4) Order 2003, SI 2003/1725), or if it appears from the register to be excepted from the effect of registration: see the Land Registration Act 2002 ss 29(2)(a)(i)-(iii), (3), 30(2)(a)(i)-(iii), (3); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 935-936. As to the register of title and registration therein see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq.

8 Land Registration Act 2002 s 48(1). For these purposes, subject to any entry in the individual register to the contrary, the order in which registered charges are entered in an individual register shows the order in which the registered charges rank as between themselves: see the Land Registration Rules 2003, SI 2003/1417, r 101; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 944.

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260. Registrable land charges.

Among the charges which may be registered in the register of land charges¹ are a puisne mortgage, that is, a legal mortgage which is not protected by a deposit of documents relating to the legal estate affected², and a general equitable charge, that is, any equitable charge which is not secured by a deposit of documents relating to the legal estate affected, and does not arise or affect an interest arising under a trust of land or settlement, and is not a charge given by way of indemnity against rents equitably apportioned or charged exclusively on land in exoneration of other land and against the breach or non-observance of covenants or conditions, and is not included in any other class of land charge³. Also registrable are estate contracts, that is, contracts by an estate owner (or by a person entitled at the date of the contract to have a legal estate conveyed to him) to convey or create a legal estate, including options to purchase, rights of pre-emption⁴ and equitable mortgages⁵. The statutory right of a spouse or civil partner to occupy the matrimonial or partnership home is registrable as a charge on the legal estate⁶. Charges of registered land are not subject to the Land Charges Act 1972⁷.

1 See **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628-632. As to other securities of a special nature which may be registered see **LAND CHARGES** vol 26 (2004 Reissue) PARA 622 et seq. As to registration of land charges created by companies see **COMPANIES** vol 15 (2009) PARA 1277 et seq; **LAND CHARGES** vol 26 (2004 Reissue) PARA 606. As to local land charges see **LAND CHARGES** vol 26 (2004 Reissue) PARA 671 et seq.

2 See the Land Charges Act 1972 s 2(1), (4)(i); and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628-629. For the principle that possession by a mortgagee of documents of title is sufficient to constitute notice of the mortgage to subsequent incumbrancers and to preserve its priority see PARAS 262, 284.

3 See the Land Charges Act 1972 s 2(1), (4)(iii); and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628, 631. An equitable charge created by deposit of title deeds (see PARA 119 et seq) was not registrable as an estate contract (see s 2(1), (4)(iv); and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628, 632), even though it was treated as a contract to create a mortgage (see *United Bank of Kuwait v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA) or contained an ancillary agreement to execute a mortgage (see *Property Discount Corp Ltd v Lyon Group Ltd* [1981] 1 All ER 379, [1981] 1 WLR 300, CA).

4 See the Land Charges Act 1972 s 2(1), (4)(iv); and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628, 632.

5 See *United Bank of Kuwait v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA. An equitable mortgage protected by deposit of title deeds creates an equitable charge which is not registrable: see *United Bank of Kuwait v Sahib*.

6 See the Family Law Act 1996 s 31(13); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.

7 See the Land Charges Act 1972 s 14(1); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 605.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/4. PRIORITY OF MORTGAGES/(1) PRIORITY BETWEEN MORTGAGEES OF LAND/261. Priority of registered land charges.

261. Priority of registered land charges.

The registration of any instrument or matter in any register kept under the Land Charges Act 1972 or any local land charges register, is deemed to constitute actual notice of that instrument or matter to all persons and for all purposes connected with the land affected¹. Hence, the legal estate will not avail a subsequent legal mortgagee, as he will be deemed to take with notice of any registered charge². On the other hand, if a registrable charge is not registered, it is void as against a purchaser of the land charged (including a subsequent mortgagee or chargee³), although an estate contract, including an equitable mortgage, is void only as against a purchaser for money or money's worth⁴. Moreover, even if he has notice of the charge (that is, notice actual or constructive in the ordinary sense as opposed to statutory actual notice arising from registration), a subsequent mortgagee is not prejudicially affected by it⁵, whether or not he is a purchaser in good faith⁶, and so he has priority over the unregistered incumbrance notwithstanding that he may be in fact well aware of it. When mortgages which require to be registered as land charges (that is, every mortgage, whether legal or equitable, not being a mortgage protected by the deposit of documents relating to the legal estate affected) are registered, they rank according to their date of registration⁷.

1 See the Law of Property Act 1925 s 198(1); and **EQUITY** vol 16(2) (Reissue) PARA 577; **LAND CHARGES** vol 26 (2004 Reissue) PARAS 616-617. See also *Williams v Burlington Investments Ltd* (1977) 121 Sol Jo 424, HL, where a legal charge executed pursuant to an agreement to execute a legal charge in an agreement for sale, which had been registered as an estate contract, had priority to, even though executed after, another legal charge executed after the sale.

2 See PARA 263.

3 See the Land Charges Act 1972 s 4(5), (6); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 643. Cf *Khoury v Phillip Said Azar* [1953] 1 WLR 21, PC, where an equitable mortgage not registered in accordance with a local ordinance was held to be of no effect. As to the meaning of 'purchaser' see *McCarthy & Stone Ltd v Julian S Hodge & Co Ltd* [1971] 2 All ER 973, [1971] 1 WLR 1547; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 643.

4 See the Land Charges Act 1972 s 4(6); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 643. Nominal consideration is sufficient: see *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL.

5 See the Law of Property Act 1925 s 199(1)(i); PARA 279; and **EQUITY** vol 16(2) (Reissue) PARA 583; **LAND CHARGES** vol 26 (2004 Reissue) PARA 616.

6 *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL. As to the meaning of 'a purchaser in good faith' see *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964.

7 See the Law of Property Act 1925 s 97; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 629. As to the difficulties, in certain cases, in reconciling s 97 and the Land Charges Act 1972 s 4(5) see Fisher and Lightwood's *Law of Mortgage* (11th Edn, 2001) pp 678-679.

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262. Effect of possession of title deeds.

A first legal mortgagee has the same right to possession of the title deeds of the mortgaged property as if his security either included the fee simple or had been effected by assignment¹. The Law of Property Act 1925 does not prejudicially affect the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land²; and neither the Law of Property Act 1925, the Land Charges Act 1972 nor the

Local Land Charges Act 1975 directly interferes with the general rule that possession of the title deeds by a mortgagee is sufficient to give him priority over a subsequent incumbrancer, as the absence of the title deeds from the mortgagor's possession is sufficient to affect the subsequent incumbrancer with actual notice (if he makes proper inquiries as to deeds) or constructive notice (if he fails to make such inquiries) of the existence of the prior mortgage³.

A legal mortgagee who has possession of the deeds will be bound by prior charges registered at the time when the mortgage accompanied by deposit of deeds was made⁴.

1 See the Law of Property Act 1925 ss 85(1) proviso, 86(1) proviso; and PARA 485 et seq. As to the meaning of 'legal mortgagee' see PARA 104 note 1.

2 See the Law of Property Act 1925 s 13. As to the meaning of 'legal estate' see PARA 105 note 2. As to the meaning of 'land' see PARA 104 note 2. As to the effect of the omission to obtain the deeds, which is also preserved by s 13, see PARA 282.

3 See PARA 282 et seq. For the rule that mortgages and charges protected by deposit of documents are not capable of being registered as land charges see PARA 260.

4 See the Law of Property Act 1925 s 97; the Land Charges Act 1972 s 4(5); PARA 261; and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 629, 643.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/4. PRIORITY OF MORTGAGES/(1) PRIORITY BETWEEN MORTGAGEES OF LAND/263. Effect of possession of legal estate.

263. Effect of possession of legal estate.

As, since the enactment of the Law of Property Act 1925, it is possible for there to be a succession of legal mortgages, the opportunities for setting up a legal estate against an equitable interest appear to have been increased¹. In practice, however, the occasions for resorting to the old rules for determining priorities which favour the possessor of the legal estate as such² are very much decreased by the provisions of the Law of Property Act 1925, the Land Charges Act 1972 and the Local Land Charges Act 1975 with regard to registration of mortgages and charges which are not accompanied by a deposit of documents relating to the legal estate affected, including the provisions that registration is to be deemed to constitute actual notice and that instruments or matters capable of registration which are not registered are to be void against a purchaser, including a mortgagee³. In general a first mortgagee will have a legal term of years and will hold the deeds, and he will have unquestioned priority; but the priorities of other incumbrancers will usually depend on registration or its absence, and on the effect of registration as actual notice.

1 As to obtaining priority by getting in the legal estate see **EQUITY** vol 16(2) (Reissue) PARAS 570-575. As to the former right of a mortgagee to tack after getting in the legal estate see PARA 264.

2 As to the principle that, apart from statute, a purchaser of a legal estate for value without notice obtains priority over an earlier equitable owner see **EQUITY** vol 16(2) (Reissue) PARAS 565-567.

3 See PARA 276 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/4. PRIORITY OF MORTGAGES/(1) PRIORITY BETWEEN MORTGAGEES OF LAND/264. Partial abolition of tacking.

264. Partial abolition of tacking.

'Tacking' means the right of a mortgagee to add later advances to earlier advances so as to obtain priority over an intermediate incumbrancer. A mortgagee's right to tack¹ still exists to some extent in relation to further advances made by him², but has otherwise been abolished³.

1 A mortgagee's right to tack formerly existed:

- 1 (1) where a legal mortgagee made a further advance without having notice at the time when the further advance was made of the existence of an intermediate incumbrance (see eg *Tenison v Sweeney* (1844) 1 Jo & Lat 710; *Wyllie v Pollen* (1863) 3 De GJ & Sm 596);
- 2 (2) where a third incumbrancer, having made his advance without notice of the second incumbrance, obtained a transfer of the first mortgage so as to obtain the benefit of the first mortgagee's legal estate (see eg *Brace v Duchess of Marlborough* (1728) 2 P Wms 491; *McCarthy and Stone Ltd v Julian S Hodge & Co Ltd* [1971] 2 All ER 973, [1971] 1 WLR 1547); and
- 3 (3) where a mortgage was made to secure further advances and such advances were made without notice of an intermediate incumbrance (see eg *Hopkinson v Rolt* (1861) 9 HL Cas 514).

While tacking was based on the special value attached to the legal estate, it was not essential that the mortgagee claiming to tack should have the legal estate actually vested in him. It was sufficient if he had the best right to call for it (see PARA 274). It has been doubted whether the type of tacking referred to in head (3) above depended on the doctrine of estates in land: see *Matzner v Clyde Securities Ltd* [1975] 2 NSWLR 293, NSW SC. Although unsecured debts could not be tacked to mortgage debts as against intermediate incumbrances or the mortgagor, they could be tacked against a person entitled to the equity of redemption on the mortgagor's death so as to entitle the mortgagee to recover all the debts in one action (see eg *Coleman v Winch* (1721) 1 P Wms 775), but not so as to entitle him to give priority in respect of the debts tacked over other creditors (*Pile v Pile* (1875) 23 WR 440).

2 See PARA 265.

3 Law of Property Act 1925 s 94(3). The Law of Property Act 1925 did not affect any priority acquired before 1 January 1926 (ie the commencement of the Act) by tacking, or in respect of further advances made without notice of a subsequent incumbrance or by arrangement with the subsequent incumbrancer: s 94(3) proviso. Section 94 applies to mortgages of land, whether made before or after the commencement of the Act, but not to charges on registered land: s 94(4) (amended by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (9)). The Law of Property Act 1925 s 94 contains no definition of the right to tack and does not distinguish between the right to tack by virtue of the legal estate, and the narrower right to tack by virtue of the contract where the first mortgage contains a provision that it is to extend to further advances. However, s 94 appears to apply to both forms of tacking, and its general effect is to abolish tacking by virtue of the legal estate; to extend tacking to further advances made by a mortgagee, legal or equitable, without notice of a later mortgage; and, where a mortgage is made to cover further advances, to enable these advances to be made without further search. It seems that, provided he does not bring himself within the doctrine of tacking, a mortgagee may still get in the legal estate after his mortgage and use it for his protection if the conveyance to him of the legal estate was not a breach of trust. In the case of land, the principle appears to be limited to cases where the legal estate is obtained by redeeming a prior legal mortgage. The principle also applies in the case of shares: see PARAS 273-274. Cf *Bailey v Barnes* [1894] 1 Ch 25 at 37, CA; *McCarthy and Stone Ltd v Julian S Hodge & Co Ltd* [1971] 2 All ER 973, [1971] 1 WLR 1547.

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265. Modern law of tacking.

A prior mortgagee¹ has a right to make further advances to rank in priority to subsequent mortgages², whether legal or equitable:

- 8 (1) if an arrangement to that effect has been made with the subsequent mortgagees³;

- 9 (2) if he had no notice of those subsequent mortgages at the time when the further advance was made by him⁴; or
- 10 (3) whether or not he had such notice, where the mortgage imposes an obligation on him to make further advances⁵.

These provisions apply whether or not the prior mortgage was made expressly for securing further advances⁶. As registration of the subsequent incumbrance as a land charge operates as actual notice⁷, it is necessary to search the registers before making a further advance, except where the prior mortgage was made expressly for securing a current account or other further advances. If it was so made, then the current account can be operated or further money advanced without further search than that made at the time of the first mortgage, or when the last search, if any, by or on behalf of the mortgagee was made, whichever last happened⁸, and the prior mortgage will have priority over subsequent incumbrancers.

Charges on registered land are excluded from these provisions⁹.

Where a spouse's or civil partner's estate is subject to a mortgage and the other spouse's or partner's rights of occupation are subsequently registered as a land charge against that estate, the rights of occupation are deemed to be a mortgage subsequent in date to the first mortgage¹⁰.

1 As to the meaning of 'mortgagee' see PARA 104 note 1.

2 As to the meaning of 'mortgage' see PARA 101 note 4.

3 Law of Property Act 1925 s 94(1)(a).

4 Law of Property Act 1925 s 94(1)(b). 'Notice' includes constructive notice: s 205(1)(xvii). The requirement that the mortgagee seeking to tack should not have had notice of subsequent incumbrances is in accordance with the principle laid down in *Hopkinson v Rolt* (1861) 9 HL Cas 514. See also *Calisher v Forbes* (1871) 7 Ch App 109; *London and County Banking Co Ltd v Ratcliffe* (1881) 6 App Cas 722, HL; *Bradford Banking Co Ltd v Briggs, Son & Co* (1886) 12 App Cas 29, HL; *Union Bank of Scotland v National Bank of Scotland* (1886) 12 App Cas 53, HL; *Freeman v Laing* [1899] 2 Ch 355. As to the doctrine of notice see **EQUITY** vol 16(2) (Reissue) PARA 576 et seq.

5 Law of Property Act 1925 s 94(1)(c). This provision overrules *West v Williams* [1899] 1 Ch 132, CA, where the principle of *Hopkinson v Rolt* (1861) 9 HL Cas 514 (see note 4) was held to apply even though the mortgagee seeking to tack had been under an obligation to make further advances.

6 Law of Property Act 1925 s 94(1).

7 See PARA 261.

8 See the Law of Property Act 1925 s 94(2) (amended by the Law of Property Act (Amendment) Act 1926 s 7, Schedule; and the Law of Property Act 1969 s 16, Sch 2 Pt I).

9 Law of Property Act 1925 s 94(4) (amended by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (9)). As to further advances in the case of registered land see PARA 266.

10 See the Family Law Act 1996 s 31(12) (amended by the Civil Partnership Act 2004 s 82, Sch 9 Pt 1 para 2(1), (11)); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.

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266. Further advances in the case of registered land.

The proprietor of a registered charge¹ may make a further advance on the security of the charge ranking in priority to a subsequent charge if he has not received from the subsequent chargee notice² of the creation of the subsequent charge³, if the advance is made in pursuance of an obligation which at the time of the creation of the subsequent charge was entered in the register in accordance with rules⁴, or if the parties to the prior charge have agreed a maximum amount for which the charge is security and at the time of the creation of the subsequent charge the agreement was entered in the register in accordance with rules⁵.

Tacking in relation to a charge over registered land is otherwise possible only with the agreement of the subsequent chargee⁶.

1 As to the meaning of 'registered charge' see PARA 159 note 7. As to the meaning of 'registered' see PARA 155 note 3; and as to the meaning of 'charge' see PARA 155 note 5.

2 Notice for these purposes is treated as received at the time when, in accordance with rules, it ought to have been received: see the Land Registration Act 2002 s 49(2). As to the time when notice ought to have been received see the Land Registration Rules 2003, SI 2003/1417, r 107; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948.

3 See the Land Registration Act 2002 s 49(1); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948.

4 See the Land Registration Act 2002 s 49(3)(a), (b); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948. As to registration of such obligations see the Land Registration Rules 2003, SI 2003/1417, r 108; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948. As to the register of title and registration therein see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810 et seq.

5 See the Land Registration Act 2002 s 49(4)(a), (b); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948. As to registration of such agreements see the Land Registration Rules 2003, SI 2003/1417, r 109; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948. Rules may disapply the Land Registration Act 2002 s 49(4) in relation to charges of a description specified in the rules or provide for its application to be subject, in the case of charges of a description so specified, to compliance with such conditions as may be so specified: see s 49(5); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948.

6 See the Land Registration Act 2002 s 49(6); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948.

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(2) PRIORITY BETWEEN MORTGAGEES OF PERSONALTY AND OF EQUITABLE INTERESTS IN LAND

(i) Notice or Registration

267. Choses or things in action.

Where the mortgaged property is a debt or other money owing¹, or an interest in trust funds², a mortgagee who gives written notice to the debtor or trustee gains priority over a mortgagee earlier in date who omits to give notice³. However, notice to the trustees, without requiring payment of income to the assignees, is not equivalent to taking possession⁴, and notice to the trustees will not give priority over advances previously made by them⁵. The omission to give notice leaves the property under the mortgagor's control and deprives the second mortgagee of the chance of ascertaining the existence of the first mortgage by inquiry of the debtor or trustee. The priority of the second mortgagee does not depend on whether in fact he made inquiry; in such a case it depends solely on notice⁶. A second mortgagee will not gain priority if he gave no value⁷ or if he had knowledge of a prior mortgage at the time of his advance⁸. A

judgment creditor who obtains a charging order is treated as a volunteer and cannot therefore gain priority by giving notice⁹. Where notices are contemporaneous, the incumbrances rank in order of time of creation¹⁰.

1 As to mortgages of choses or things in action see PARA 232.

2 *Dearle v Hall* (1828) 3 Russ 1 at 11-12, 23; cf *Hill v Peters* [1918] 2 Ch 273 at 279. The rule in *Dearle v Hall* has no application where in fact the assignor has no beneficial interest that he can effectively assign: see *BS Lyle Ltd v Rosher* [1958] 3 All ER 597, [1959] 1 WLR 8, HL.

3 As to the necessity for written notice to be given in order to render effectual a legal assignment of a chose in action, and as to the notice which is sufficient, see **CHOSSES IN ACTION** vol 13 (2009) PARAS 72, 80. As to notice in relation to equitable assignments of choses in action see **CHOSSES IN ACTION** vol 13 (2009) PARA 40 et seq. As to whether there is any necessity for a trustee in bankruptcy to give notice of his title see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 394, 457.

4 *Re Pawson's Settlement, Higgins v Pawson* [1917] 1 Ch 541.

5 *Re Goddard, Hooker v Buckley* (1912) 57 Sol Jo 42, CA.

6 *Ward v Duncombe* [1893] AC 369, HL. See also **CHOSSES IN ACTION** vol 13 (2009) PARA 40 et seq. Notice given to an administrator before he obtains administration is ineffectual: *Re Kinahan's Trusts* [1907] 1 IR 321.

7 *Justice v Wynne* (1860) 12 I Ch R 289, CA. See also **CHOSSES IN ACTION** vol 13 (2009) PARAS 40, 43.

8 *Re Holmes* (1885) 29 ChD 786; *Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd* [1988] 1 All ER 524, [1987] 1 WLR 1703 (revsd on different grounds [1989] 1 All ER 1161, [1989] 1 WLR 800, CA). See also **CHOSSES IN ACTION** vol 13 (2009) PARA 43.

9 *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1995] 2 All ER 973; affd on different grounds [1997] Ch 107, [1996] 3 All ER 215, CA.

10 *Boss v Hopkinson* (1870) 18 WR 725; *Calisher v Forbes* (1871) 7 Ch App 109.

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268. Equitable interests in unregistered land.

Before 1926 the doctrine of acquiring priority by notice did not apply to land¹, but it applied to proceeds of sale of real estate and to any interest in land which could reach the assignor's hands only in the form of money². However, it now extends to dealings with equitable interests in unregistered land³, capital money, and securities representing capital money effected after 31 December 1925⁴, so that the doctrine applies now to equitable interests in both real and personal estate. A judgment creditor who obtains a charging order cannot, however, take advantage of the rule⁵.

As regards land and the proceeds of sale of land, the persons to whom notice must be given are:

- 11 (1) in the case of a dealing with an equitable interest in settled land, capital money or securities representing capital money, the trustees of the settlement⁶;
- 12 (2) in the case of a dealing with an equitable interest in land subject to a trust of land, the trustees⁷; and
- 13 (3) in any other case of a dealing with an equitable interest in land, the estate owner of the land affected⁸.

As regards equitable interests in both real and personal property, however, the notice must be in writing or it will not affect the priorities of competing claims of purchasers⁹.

1 See **EQUITY** vol 16(2) (Reissue) PARA 568. In *Re Carew's Estate* (1868) 16 WR 1077, it was held that the doctrine did not apply to personalty which by statute was real estate; but this was not followed in *Re Sandes' Trusts* [1920] 1 IR 342, CA, as regards capital money arising under the Settled Land Act 1882 (largely repealed: see now the Settled Land Act 1925).

2 *Re Hughes' Trusts* (1864) 2 Hem & M 89; *Re Roche's Estate* (1890) 25 LR Ir 284 at 292, Ir CA; *Lloyds Bank v Pearson* [1901] 1 Ch 865. See **CHOSSES IN ACTION** vol 13 (2009) PARAS 45, 50.

3 As to equitable interests in registered land see PARA 269.

4 See the Law of Property Act 1925 s 137(1); and **CHOSSES IN ACTION** vol 13 (2009) PARA 45.

5 *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1995] 2 All ER 973; affd on different grounds [1997] Ch 107, [1996] 3 All ER 215, CA.

6 Law of Property Act 1925 s 137(2)(i); and see **CHOSSES IN ACTION** vol 13 (2009) PARA 50. As to indorsement of a memorandum of assignment on the trust instrument in lieu of notice, and the nomination of a trust corporation to receive notices, see ss 137(4), 138; and **CHOSSES IN ACTION** vol 13 (2009) PARAS 51, 53. Section 137(2) does not apply where the money or securities are in court: see PARA 272.

7 Law of Property Act 1925 s 137(2)(ii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (15)).

8 Law of Property Act 1925 s 137(2)(iii).

9 Law of Property Act 1925 s 137(3). Before 1926 formal notice was not required; it was sufficient that the trustee had such knowledge of the transaction as an ordinary man of business would act upon (*Lloyd v Banks* (1868) 3 Ch App 488 at 491; *Re Dallas* [1904] 2 Ch 385 at 399, CA; *Ipswich Permanent Money Club Ltd v Arthy* [1920] 2 Ch 257), but the knowledge had to be brought clearly to the trustee's mind (*Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 ChD 406, CA).

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269. Equitable interests in registered land.

The basic rule governing the priority of an interest affecting a registered estate or charge¹ is that such priority is not affected by a disposition of the estate or charge, although this rule is modified so as to postpone such an interest where a registrable disposition² of a registered estate or charge is made for valuable consideration³.

1 As to the meanings of 'registered estate' and 'registered charge' see PARA 159 note 7.

2 As to the meaning of 'registrable disposition' see PARA 159 note 8.

3 See the Land Registration Act 2002 ss 28-30; PARA 259; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 934-936.

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270. Insurance policies.

In respect of notice, insurance policies are subject to the same rule as other choses or things in action, and notice to the office or the underwriter by a later incumbrancer will, in the absence of other circumstances, give him priority over an earlier incumbrancer¹. Companies are not bound to receive notice of assignments of shares, and the priorities of incumbrancers on shares are therefore not regulated by notice².

¹ *Re Lake, ex p Cavendish* [1903] 1 KB 151; *Re Weniger's Policy* [1910] 2 Ch 291; *Colonial Mutual General Insurance v ANZ Banking Ltd* [1995] 3 All ER 987, [1995] 1 WLR 1140, PC. This result is assisted by the statutory effect of notice under the Policies of Assurance Act 1867 s 3: see further PARA 234; and **INSURANCE** vol 25 (2003 Reissue) PARAS 545-547.

² See PARA 273. As to the effect of an incumbrancer serving a stop notice see PARA 275.

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271. Priority determined by registration.

Where securities on personal property require to be or may be registered, their priority is determined by the order of the dates of registration. This applies to bills of sale¹, mortgages of ships and shares of ships², mortgages of aircraft and hovercraft³, and patents⁴.

¹ See the Bills of Sale Act 1878 s 10; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1800-1804.

² See the Merchant Shipping Act 1995 s 16, Sch 1 para 8; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 321.

³ See the Mortgaging of Aircraft Order 1972, SI 1972/1268, art 14(2); PARA 248; and **AIR LAW** vol 2 (2008) PARA 432.

⁴ See the Patents Act 1977 s 33; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 589. As to registration generally see s 32; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 585 et seq.

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(ii) Stop Orders on Funds

272. Stop order as notice.

Where the subject of the security is a fund in court, the obtaining of a stop order relating to that fund¹ gives the same priority as notice to the trustees with regard to funds in their hands² and notice to the trustees is ineffectual³; but notice to the trustees before the payment of the fund into court continues to be effectual notwithstanding a stop order obtained by another incumbrancer⁴, although the trustee himself will not, without obtaining a stop order, have priority for a charge in his own favour against an incumbrancer who obtains a stop order⁵.

- 1 See CPR 73.13; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1487, 1489.
- 2 *Greening v Beckford* (1832) 5 Sim 195. See also *Montefiore v Guedalla* [1903] 2 Ch 26, CA; and **CHOSSES IN ACTION** vol 13 (2009) PARA 55. As to a stop order on a fund carried to a separate account see **CHOSSES IN ACTION** vol 13 (2009) PARA 55.
- 3 *Pinnock v Bailey* (1883) 23 ChD 497.
- 4 *Livesey v Harding* (1856) 23 Beav 141; *Re Marquis of Anglesey, Countess de Galve v Gardner* [1903] 2 Ch 727 at 732. See also **CHOSSES IN ACTION** vol 13 (2009) PARA 55.
- 5 *Swayne v Swayne* (1848) 11 Beav 463.

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(3) PRIORITIES BETWEEN MORTGAGEES OF SHARES

273. Equitable titles to shares.

Where several persons claim shares registered in another person's name, the equitable title which is prior in time prevails unless the conduct of the prior claimant disentitles him to priority or a claimant under a subsequent equitable title has, as between him and the company, acquired the full status of a shareholder or an absolute and unconditional right to be registered as the owner¹. Such a creditor may gain priority².

Notice given to the company does not affect the priority of equitable claims in respect of registered shares³. Such a notice is not, however, inoperative for all purposes, and the receipt by a company of notice of a charge upon some of its shares will prevent the company from availing itself as against those shares of any lien under its articles of association for a debt to the company incurred subsequently to its receipt of the notice⁴. Although no notice of a trust may be entered in the company's register⁵ and the articles of association usually provide that the company need not recognise trusts, if directors know of circumstances showing that a transfer is fraudulent they may be personally liable⁶. Where a board of directors has actual knowledge of an equitable claim by a person to shares in respect of which a transfer to another has been lodged for registration, registration should, as a matter of policy, be delayed to give notice to that person of the proposed transfer⁷. Even the sending of this notice does not protect the company in the case of its acting upon a forged transfer, and the shareholder is not estopped from alleging that the transfer is invalid although he does not reply to the notice⁸.

1 *Moore v North Western Bank* [1891] 2 Ch 599 at 602-603 per Romer J. See also *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL.

2 See PARA 274.

3 *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 30, HL. See also *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585, [1996] 1 WLR 387, CA. An equitable mortgagee may nevertheless, by giving notice to the company, prevent a subsequent equitable claimant from obtaining priority by getting a duly executed and stamped transfer registered by the company (*Roots v Williamson* (1888) 38 ChD 485), and he can prevent the company acquiring a lien on the shares having priority to his mortgage in respect of money which becomes due to the company from the shareholder after it has received notice of the mortgage (see **COMPANIES** vol 15 (2009) PARA 1208). Where a company has no lien on shares, it is not entitled to priority for its claim over an equitable assignee of the shares: *Bank of NT Butterfield & Son Ltd v Golinsky* [1926] AC 733, PC. As to the effect of an incumbrancer serving a stop notice see PARA 275.

4 *Bradford Banking Co v Briggs, Son & Co Ltd* (1886) 12 App Cas 29, HL, applying the principle of *Hopkinson v Rolt* (1861) 9 HL Cas 514. See also *Champagne Perrier-Jouet SA v HH Finch Ltd* [1982] 3 All ER 713, [1982] 1 WLR 1359. Where, however, the company has no lien on the shares, it has no priority over an equitable assignee of those shares: *Bank of NT Butterfield & Son Ltd v Golinsky* [1926] AC 733, PC.

5 See the Companies Act 2006 s 126; and **COMPANIES** vol 14 (2009) PARA 343. The rule in *Dearle v Hall* (1828) 3 Russ 1 does not apply to dealings in shares in an English company: *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 30-31, HL.

6 *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424 at 445, 453, CA; affd without reference to this point sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL. See generally PARA 237.

7 *Grundy v Briggs* [1910] 1 Ch 444 at 449; *Re Cadogan and Hans Place Estate Co, ex p Rolt* [1876] WN 91. See also PARA 275.

8 *Barton v London and North Western Rly Co* (1889) 24 QBD 77, CA; *Welch v Bank of England* [1955] Ch 508, [1955] 1 All ER 811.

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274. Effect of obtaining legal title.

A legal title¹ to securities acquired in perfection of an equitable title when the equitable title has been obtained without notice of prior equities will oust those equities, even though its holder acquired the legal title with notice of the prior equities². If, however, an equitable title is acquired with notice of prior equities, the subsequent getting in of the legal title does not assist the holder and he takes subject to the prior equities³. Notice of prior equities is imputed where the circumstances are such as to make it reasonable that inquiry should be made as to the title of the person proposing to deal with the securities⁴; thus a person receiving from another, who is not the registered owner of the securities, a certificate accompanied by a transfer signed in blank by the registered owner is affected with notice of a possible infirmity in the title of the person from whom he receives them⁵. On the other hand, knowledge merely of the fact that the person proposing to deal with the securities is a broker⁶, or that the persons so proposing are joint owners of them⁷, is not sufficient to raise an imputation of notice of an infirmity in the title.

1 As to what constitutes a legal title to securities see *Macmillan Inc v Bishopsgate Trust (No 3)* [1995] 3 All ER 747 at 768-773, [1995] 1 WLR 978 at 999-1005 per Millett J; affd on different grounds [1996] 1 All ER 585, [1996] 1 WLR 387, CA. See also *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 28-29, HL, per Lord Selborne, and at 41 per Lord Blackburn; *Roots v Williamson* (1888) 38 ChD 485 at 498 per Stirling J; *Moore v North Western Bank* [1891] 2 Ch 599; *Ireland v Hart* [1902] 1 Ch 522; *Peat v Clayton* [1906] 1 Ch 659; *McCarthy & Stone Ltd v Julian S Hodge & Co Ltd* [1971] 2 All ER 973, [1971] 1 WLR 1547. See further **EQUITY** vol 16(2) (Reissue) PARA 569.

2 *Dodds v Hills* (1865) 2 Hem & M 424; *Blackwood v London Chartered Bank of Australia* (1874) LR 5 PC 92; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747 at 772-773, [1995] 1 WLR 978 at 1003-1005 per Millett J (affd on different grounds [1996] 1 All ER 585, [1996] 1 WLR 387, CA).

3 *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL.

4 *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL.

5 *France v Clark* (1884) 26 ChD 257, CA; *Fox v Martin* (1895) 64 LJCh 473; *Hutchison v Colorado United Mining Co and Hamill* (1886) 3 TLR 265, CA.

6 *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168; *London Joint Stock Bank v Simmons* [1892] AC 201, HL.

7 *Kaemena v Central Bank of London* (1888) 4 TLR 657.

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275. Stop notice.

An incumbrancer with an equitable interest in shares can protect his interests by obtaining a stop notice from the High Court¹. When served on the company this does not give him any priority in respect of his incumbrance, but it prevents the registration of a transfer of the shares without notice to the incumbrancer² and until he has had time to obtain a charging order³ or a stop order⁴.

1 See CPR 73.16-73.21; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1487, 1492-1496.

2 See CPR 73.18; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1493.

3 See CPR 73.2-73.10; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1467-1485.

4 See CPR 73.11-73.15; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1488-1491.

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(4) FAILURE TO GAIN, OR LOSS OF, PRIORITY

(i) Priority Barred by Notice of Prior Rights

276. Effect of notice of prior rights.

Prima facie an incumbrancer later in point of time may be entitled to priority over an earlier incumbrancer by reason of possession of the legal estate, or by notice to a debtor or to trustees or to an insurance office, by obtaining a stop order¹, or by registration in the register of patents². However, he will fail to gain this priority if he has notice of the earlier incumbrance at the time when he advances his money³. The notice may be either actual or constructive, and the registration of an instrument or matter in any register kept under the Land Charges Act 1972⁴ or in any local land charges register⁵ is deemed to constitute actual notice of the instrument or matter⁶.

1 As to stop orders as notice see PARA 272.

2 As to registration of patents determining priority see PARA 271.

3 As to notice avoiding priority in particular cases see eg *Ward v Royal Exchange Shipping Co, ex p Harrison* (1887) 58 LT 174 at 178 (debtor); *Re Ind, Coope & Co Ltd, Fisher v Ind, Coope & Co Ltd, Knox v Ind, Coope & Co Ltd, Arnold v Ind, Coope & Co Ltd* [1911] 2 Ch 223 (debtor); *Ward v Duncombe* [1893] AC 369 at 392, HL, per Lord Macnaghten (trustees); *Montefiore v Guedalla* [1903] 2 Ch 26 at 38, CA (trustees); *Newman v Newman* (1885) 28 ChD 674 (insurance policy); *Re Weniger's Policy* [1910] 2 Ch 291 (insurance policy); *New Ixion Tyre and Cycle Co v Spilsbury* [1898] 2 Ch 484, CA (register of patents). As to cases where the priority of securities on personal property is determined by registration see PARA 271. As to priorities between trustees for debenture

holders with a floating charge and specific assignees of a chose or thing in action see *Re Ind, Coope & Co Ltd, Fisher v Ind, Coope & Co Ltd, Knox v Ind, Coope & Co Ltd, Arnold v Ind, Coope & Co Ltd* above. See also *McCarthy and Stone Ltd v Julian S Hodge & Co Ltd* [1971] 2 All ER 973, [1971] 1 WLR 1547.

4 As to the mortgages and charges which may be registered under the Land Charges Act 1972 see PARA 260; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 622 et seq.

5 As to local land charges see **LAND CHARGES** vol 26 (2004 Reissue) PARA 671 et seq.

6 See PARA 261.

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277. Actual notice.

Actual notice is equally effectual whether it is received by the incumbrancer himself or by a solicitor or other agent¹ employed by him in the matter of the mortgage. Notice to a director is not necessarily notice to the company².

1 The extent to which notice to an agent is imputed to a mortgagee is restricted by statute: see the Law of Property Act 1925 s 199(1)(ii); and PARA 279. However, the first question is whether, apart from the statutory restriction, notice to a solicitor or agent would be imputed to the principal: see *Bouts v Stenning* (1892) 8 TLR 600; *Kettlewell v Watson* (1882) 21 ChD 685 at 707; cf *Sharpe v Foy* (1868) 4 Ch App 35; *Sankey v Alexander* (2) (1874) 9 IR Eq 259 at 259n, 300, Ir CA. See also *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, [1994] 1 BCLC 464, CA; *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] Ch 1, [1995] 4 All ER 656 (affd on different grounds [1996] Ch 207, [1996] 2 All ER 277, CA); *Barclays Bank plc v Thomson* [1997] 4 All ER 816, [1997] 1 FLR 156, CA; *National Westminster Bank plc v Beaton* (1997) 30 HLR 99, 74 P & CR D19, CA. See further **EQUITY** vol 16(2) (Reissue) PARA 578. As to an agent's knowledge binding his principal see *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531 at 538, HL; *Muir's Executors v Craig's Trustees* 1913 SC 349.

2 *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, [1994] 1 BCLC 464, CA. See also *Bank of Ireland v Cogry Spinning Co Ltd* [1900] 1 IR 219 at 248; *Re David Payne & Co Ltd, Young v David Payne & Co Ltd* [1904] 2 Ch 608, CA; and **COMPANIES** vol 14 (2009) PARA 671.

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278. Constructive notice.

A mortgagee has constructive notice of an earlier incumbrance if it would have come to his knowledge, or to the knowledge of his solicitor or other agent, if proper inquiries and inspections of deeds had been made¹. Thus the mortgagee is affected with notice if he omits to make usual and proper inquiries as to the mortgagor's title², provided that those inquiries would have disclosed the earlier incumbrance³; and there is even more reason for this if he designedly abstains from making inquiry in order to avoid notice, or if he omits to follow up an inquiry suggested by actual notice⁴. Actual notice of an incumbrance is constructive notice of those other matters which the intending mortgagee would have discovered if he had made further inquiries as to the incumbrance⁵.

1 Cf the Law of Property Act 1925 s 199(1)(ii): and see PARA 279.

2 See *McCarthy and Stone Ltd v Julian S Hodge & Co Ltd* [1971] 2 All ER 973, [1971] 1 WLR 1547; and **EQUITY** vol 16(2) (Reissue) PARA 582.

3 A mortgagee having notice of a deed forming a link in the mortgagor's title has notice of the contents of the deed (*Patman v Harland* (1881) 17 ChD 353, the actual decision in which cannot survive the Law of Property Act 1925 s 44(5) (see **EQUITY** vol 16(2) (Reissue) PARA 583)), but not of matters which the deed would not have disclosed (*Carter v Williams* (1870) LR 9 Eq 678 at 681; *Wilkes v Spooner* [1911] 2 KB 473 at 487, CA).

4 See **EQUITY** vol 16(2) (Reissue) PARA 582.

5 *Taylor v Baker* (1818) 5 Price 306; *Penny v Watts* (1849) 1 Mac & G 150; *Montefiore v Browne* (1858) 7 HL Cas 241. As to the doctrine of constructive notice generally see **EQUITY** vol 16(2) (Reissue) PARA 576 et seq.

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279. Restrictions on constructive and imputed notice.

A purchaser¹ is not prejudicially affected by notice of any instrument or matter capable of registration under the Land Charges Act 1972 which is void or not enforceable as against him under that Act by reason of its non-registration², or by notice of any other instrument or matter, unless it is within his own knowledge or has in the transaction in question³ come to the knowledge of his counsel or solicitor or other agent as such⁴, or would have come to his knowledge or that of his solicitor or other agent if reasonable inquiries and inspections had been made⁵.

1 As to the meaning of 'purchaser' in this context see **SALE OF LAND** vol 42 (Reissue) PARA 55.

2 See the Law of Property Act 1925 s 199(1)(i); *Diligent Finance Co Ltd v Alleyne* (1972) 23 P & CR 346; *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, 73 P & CR 314, CA; and **EQUITY** vol 16(2) (Reissue) PARA 583.

3 Thus knowledge of the solicitor acquired in relation to a previous transaction is not imputed to the mortgagee: see the Law of Property Act 1925 s 199(1)(ii).

4 As to the effect of the statutory restriction see *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] Ch 207, [1996] 2 All ER 277, CA; *Barclays Bank plc v Thomson* [1997] 4 All ER 816, [1997] 1 FLR 156, CA; *National Westminster Bank plc v Beaton* (1997) 30 HLR 99, 74 P & CR D19, CA.

5 See the Law of Property Act 1925 s 199(1)(ii); and **EQUITY** vol 16(2) (Reissue) PARA 583. The inquiries with which s 199(1) are concerned are those which relate to whether the mortgagee will obtain good security, not to other matters such as the credit status of a borrower: see *Abbey National plc v Tufts* [1999] 2 FLR 399, [1999] Fam Law 542, CA.

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280. Constructive notice of the rights of persons in occupation of land.

A mortgagee will have constructive notice of any existing¹ non-registrable rights reasonably discoverable from inspection of the property and, in particular, from inquiry of any occupier as to his interest and the terms on which he holds it². It is not sufficient to make inquiry solely of the vendor³. The mortgagee should ask a tenant in occupation for a copy of his tenancy

agreement, but is not obliged to make further inquiry and is entitled to assume that the document represents the agreement between tenant and mortgagor⁴. Inquiry should be made of the spouse of the vendor if in occupation⁵, but need not be made of children of the vendor, since their occupation is that of their parents⁶. Where the property to be charged is owned by a company and occupied by its director, the mortgagee is not required to inquire about the rights in the mortgaged property of the director if he negotiates the loan on behalf of the mortgagor⁷.

A mortgagee is not prejudicially affected by notice of the registrable but unregistered interest of a person in occupation, such as an estate contract⁸ or a claim for a property adjustment order⁹. The equitable interests of a person in occupation under a trust of land may be overreached where the mortgage is granted by at least two trustees of the trust and capital money arising on the mortgage is paid to them or by their direction¹⁰.

1 As to the position where the rights of the occupier are created at the same time as the mortgage see PARA 294.

2 *Hunt v Luck* [1902] 1 Ch 428 at 432-433, CA, per Vaughan Williams LJ. This principle was preserved by the Law of Property Act 1925 s 14: see *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL. A mortgagee of registered land is bound by the interests of persons in actual occupation: see the Land Registration Act 2002 Sch 3 para 2; PARA 293; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 962.

3 *Hodgson v Marks* [1971] Ch 892, [1971] 2 All ER 684, CA.

4 *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089.

5 See *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL; *Hodgson v Marks* [1971] Ch 892, [1971] 2 All ER 684, CA (disapproving *Caunce v Caunce* [1969] 1 All ER 722 at 727-728, [1969] 1 WLR 286 at 293 per Stamp J).

6 *Hypo-Mortgage Services Ltd v Robinson* [1997] 2 FCR 422, [1997] 2 FLR 71, CA.

7 *Midland Bank Ltd v Farmpride Hatcheries Ltd* [1981] 2 EGLR 147, CA.

8 *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, 73 P & CR 314, CA. See also PARA 279. As to the incumbrances which are registrable see **LAND CHARGES** vol 26 (2004 Reissue) PARA 622 et seq.

9 *Whittingham v Whittingham* [1979] Fam 9, [1978] 3 All ER 805, CA.

10 See the Law of Property Act 1925 ss 2, 27; *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 249.

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281. Constructive notice of the rights of the mortgagor to set aside the mortgage.

If the mortgagee knows of certain facts which put him on inquiry as to the possible existence of the rights of the mortgagor to set aside the transaction and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of what he would have discovered if he had made reasonable inquiry¹. If he does make reasonable inquiry and the results of the inquiries are such as to allay suspicion, he takes free from the rights of the mortgagor².

1 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. See also PARA 147 et seq.

2 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

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(ii) Priority Barred by Conduct in relation to Title Deeds

282. Duty to obtain title deeds.

Apart from the effect of the provisions of the Land Charges Act 1972 and the Law of Property Act 1925 as to registration of puisne mortgages and equitable charges¹, and as to notice², a legal mortgagee who, on taking his mortgage, omits to inquire for the title deeds is postponed to an earlier incumbrancer in whose possession they then are³, and also to a subsequent incumbrancer who inquires for the deeds and gets them or, if he is the third incumbrancer, inquires and finds that they are with the second incumbrancer⁴. The legal mortgagee is not, however, postponed if he makes inquiry and receives a reasonable excuse for the non-delivery of the deeds⁵. Nor is he postponed if he receives only part of the deeds under a reasonable belief that he is receiving all of them⁶.

1 See PARA 260.

2 See PARA 276 et seq.

3 As to the right to custody of deeds see PARA 485 et seq. The mere possession of deeds does not entitle the equitable incumbrancer to priority (*Thorpe v Holdsworth* (1868) LR 7 Eq 139 at 146; and see *Taylor v Russell* [1891] 1 Ch 8 at 19, CA) and in proceedings by the legal mortgagee he can be required to give them up notwithstanding that he is a purchaser for value in good faith without notice: see generally **EQUITY** vol 16(2) (Reissue) PARA 570 et seq. Formerly the omission to make any inquiry for the deeds was treated as evidence of fraud, or gross or wilful negligence, and on this ground the legal mortgagee was postponed (*Hewitt v Loosemore* (1851) 9 Hare 449 at 458; *Hunt v Elmes* (1860) 2 De GF & J 578; *Colyer v Finch* (1856) 5 HL Cas 905 at 928; and see *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 ChD 482 at 491, CA); and it was said that in order to postpone him it must be possible for the court to infer wilful abstention (*Ratcliffe v Barnard* (1871) 6 Ch App 652, CA). The modern view is that the mere omission to make the ordinary inquiry for title deeds is sufficient to postpone the legal mortgagee, because it gives him constructive notice of the earlier incumbrance (*Berwick & Co v Price* [1905] 1 Ch 632; *Walker v Linom* [1907] 2 Ch 104), or because his negligence deprives him of the benefit of the legal estate (*Oliver v Hinton* [1899] 2 Ch 264, CA), or because his carelessness is of so aggravated a nature as to amount to the neglect of precautions which the ordinarily reasonable man would have observed (*Hudston v Viney* [1921] 1 Ch 98). See also *Lloyd's Banking Co v Jones* (1885) 29 ChD 221; *Tsang Chuen v Li Po Kwai* [1932] AC 715, PC (distinguishing *Oliver v Hinton*). The postponement was placed on the ground of notice in *Worthington v Morgan* (1849) 16 Sim 547; *Hipkins v Amery* (1860) 2 Giff 292; *Spencer v Clarke* (1878) 9 ChD 137; *Re Weniger's Policy* [1910] 2 Ch 291. See also *Maxfield v Burton* (1873) LR 17 Eq 15. The negligence of trustees binds their beneficiaries, even if they are minors: *Lloyd's Banking Co v Jones*; *Walker v Linom* above. Where mortgages are contemporaneous, the mortgagee who obtains the title deeds has priority over one who does not inquire for them: *Hopgood v Ernest* (1865) 3 De GJ & Sm 116, where, apparently, the mortgagees were tenants in common or joint tenants of the legal estate.

4 *Clarke v Palmer* (1882) 21 ChD 124. Where the legal mortgagee does not inquire for the deeds, the same principle applies both to prior and subsequent incumbrances (*Walker v Linom* [1907] 2 Ch 104); but there must be some evidence of negligence (*Re Greer, Greer v Greer* [1907] 1 IR 57). A legal mortgagee who took subject to an equitable charge by deposit of the deeds was not negligent in omitting to give notice to the equitable incumbrancer and was not postponed to a subsequent equitable incumbrancer who obtained the deeds on the first equitable incumbrancer being paid off (*Grierson v National Provincial Bank of England Ltd* [1913] 2 Ch 18); but now the legal mortgage would require to be registered as a puisne mortgage, and this case could not arise (see PARA 260). It is no longer possible to create an equitable mortgage by deposit of deeds: see PARA 118. The Law of Property Act 1925 does not affect the consequences of omission to obtain title deeds: see s 13; and PARA 258.

5 *Hewitt v Loosemore* (1851) 9 Hare 449 at 458; *Agra Bank Ltd v Barry* (1874) LR 7 HL 135; *Brown v Stedman* (1896) 44 WR 458. See also *Barnett v Weston* (1806) 12 Ves 130.

6 *Hunt v Elmes* (1860) 2 De GF & J 578; *Colyer v Finch* (1856) 5 HL Cas 905; *Ratcliffe v Barnard* (1871) 6 Ch App 652, CA; *Cottey v National Provincial Bank of England Ltd* (1904) 20 TLR 607. The same principle applies as between successive mortgagees by deposit (*Roberts v Croft* (1857) 2 De G & J 1; *Dixon v Muckleston* (1872) 8 Ch App 155), unless the prior mortgagee has left the substantial part of the deeds with the mortgagor and is otherwise negligent (*Re Lambert's Estate, Lambert Petitioner* (1884) 13 LR Ir 234, Ir CA). See also PARA 123.

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283. Effect of conduct of legal mortgagee.

A legal mortgagee who gets the title deeds into his custody and subsequently loses or parts with possession of them is not postponed to a subsequent incumbrancer to whom they are delivered on the ground of mere negligence or want of prudence in the custody of them¹, nor is he postponed if he has lent them to the mortgagor upon a reasonable representation made by the mortgagor as to his object in borrowing them². However, he will be postponed on the ground of fraud, that is, where he has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate³; and he will also be postponed if he has returned the deeds to, or left them with, the mortgagor for the purposes of enabling the mortgagor to raise money on them⁴, notwithstanding that the limit which he has assigned for the loan has been exceeded⁵.

1 *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 ChD 482, CA.

2 *Peter v Russell* (1716) 1 Eq Cas Abr 321; *Martinez v Cooper* (1826) 2 Russ 198. It may be, however, that on the legal mortgagee parting with the deeds, his mortgage would become a puisne mortgage and would require to be registered as a land charge, so that if not registered it would be void as against a subsequent incumbrancer: see the Land Charges Act 1972 ss 2(1), (4)(i), 4(5); and PARAS 260-261.

3 *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 ChD 482, CA. The judgment in this case was an attempt to give exactness to Lord Eldon's requirement in *Evans v Bicknell* (1801) 6 Ves 174 at 190, of fraud or gross negligence amounting to evidence of fraud as the condition for postponing the legal mortgagee. In *Northern Counties of England Fire Insurance Co v Whipp* above at 494, Fry LJ, while pointing out that negligence and fraud were incompatible, recognised that omission to use ordinary care in the custody of the deeds might be evidence of fraud; but the decision seems to have made it impracticable to postpone the legal mortgage in the case in question except on the ground of actual fraud (*Manners v Mew* (1885) 29 ChD 725). The Law of Property Act 1925 does not affect the consequences of the loss of title deeds: see s 13; and PARA 258.

4 *Briggs v Jones* (1870) LR 10 Eq 92.

5 *Perry Herrick v Attwood* (1857) 2 De G & J 21; *Brocklesby v Temperance Permanent Building Society* [1895] AC 173, HL. The postponement is frequently put on the ground of estoppel: see **ESTOPPEL** vol 16(2) (Reissue) PARA 1067. See also *Briggs v Jones* (1870) LR 10 Eq 92; *Marshall v National Provincial Bank of England* (1892) 61 LJCh 465; *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA; *Robinson v Montgomeryshire Brewery Co* [1896] 2 Ch 841; *Fry and Mason v Smellie and Taylor* [1912] 3 KB 282, CA. Cf *McHenry v Davies* (1870) LR 10 Eq 88; *London Joint Stock Bank v Simmons* [1892] AC 201, HL.

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284. Possession of deeds by equitable incumbrancer.

As between equitable incumbrancers the mere possession of the title deeds is not enough to give a subsequent incumbrancer priority over an earlier one¹: there must be some default on the part of the earlier incumbrancer². If the possession of the title deeds is an essential part of the earlier incumbrancer's security, the same considerations arise as in the case of a legal mortgagee, and if he omits to inquire for and get in the deeds³, or, having got them, allows them by negligence or design to be again, without sufficient reason, in the mortgagor's possession⁴, he will be postponed to a subsequent incumbrancer to whom they are delivered. An equitable incumbrancer who enters into an artificial transaction designed to give the impression that the mortgagor is the absolute and unencumbered owner will be postponed to a subsequent incumbrancer⁵.

1 See *Evans v Bicknell* (1801) 6 Ves 174 at 183, where Lord Eldon LC corrected the statement of Buller J in *Goodtitle d Norris v Morgan* (1787) 1 Term Rep 755 at 762, that a second mortgagee who took the title deeds without notice was always preferred. In *Bailey v Fermor* (1821) 9 Price 262 at 267, *Goodtitle d Norris v Morgan* above is treated as overruled on this point. See also *Barnett v Weston* (1806) 12 Ves 130 at 132; *Allen v Knight* (1846) 5 Hare 272 at 279 (on appeal (1847) 11 Jur 527). As to the postponement of equitable incumbrancers see **EQUITY** vol 16(2) (Reissue) PARA 569.

2 *Allen v Knight* (1847) 11 Jur 527; *Freeguard v Royal Bank of Scotland* (1998) 79 P & CR 81, CA. He is not in default if the mortgage is of a reversion (*Tourle v Rand* (1789) 2 Bro CC 650), or if he gets the only title deed available at the time (*Union Bank of London v Kent* (1888) 39 ChD 238, CA); and as a purchaser is not entitled to the deeds until completion, his equitable title under the contract prevails over an equitable incumbrance created by the vendor by deposit of the title deeds after the contract (*Flinn v Pountain* (1889) 58 LJCh 389), at any rate if the contract has been registered as an estate contract under the Land Charges Act 1972 s 2(1), (4) (iv) (see **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628, 632). A mortgagee not immediately entitled to deeds is not, however, bound to take precautions against a future fraud by the mortgagor in respect of them (*Union Bank of London v Kent* above), and if the mortgagee omits to get in the deeds, by reason of a false recital in the mortgage of an existing mortgage by deposit, he is not postponed to a subsequent actual mortgage by deposit (*Frazer v Jones* (1846) 5 Hare 475 (on appeal (1848) 12 Jur 443); and see *Jones v Thomas* (1862) 11 WR 50). It is no longer possible to create a mortgage by deposit of deeds alone: see PARA 118.

3 *Farrand v Yorkshire Banking Co* (1888) 40 ChD 182. See also **EQUITY** vol 16(2) (Reissue) PARA 569. A blank share transfer should be accompanied by the share certificate, and the later of two transferees, who gets the certificate, will have priority: *Kelly v Munster and Leinster Bank* (1890) 29 LR Ir 19, Ir CA.

4 If they are redelivered to the mortgagor for a particular purpose, it is negligence for the mortgagee not to press for their return after a reasonable time: *Waldron v Sloper* (1852) 1 Drew 193; *Dowle v Saunders* (1864) 2 Hem & M 242; *Layard v Maud* (1867) LR 4 Eq 397.

5 *Freeguard v Royal Bank of Scotland* (1998) 79 P & CR 81, CA.

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285. Rights as between equitable mortgagee and unpaid vendor.

Where an unpaid vendor hands to the purchaser the title deeds with a conveyance containing a receipt for the purchase money, he thereby enables the purchaser to represent himself as the owner of the property, and he will be postponed to an equitable mortgagee from the purchaser who obtains the deeds¹; and if the unpaid vendor remains in possession as tenant to the purchaser, there is no notice to a subsequent incumbrancer of his lien for unpaid purchase money².

An owner of shares who hands a transfer and the certificate to a broker for the purpose of sale is postponed to an equitable mortgagee from the broker notwithstanding that the broker by mortgaging the shares exceeds his authority³.

1 *Rice v Rice* (1854) 2 Drew 73; *Smith v Evans* (1860) 28 Beav 59; *Freeguard v Royal Bank of Scotland plc* (1998) 79 P & CR 81, CA. A prior incumbrancer who has been induced by misrepresentation to release his security will not, however, necessarily be postponed: *Beckett v Cordley* (1784) 1 Bro CC 353. In appropriate circumstances, the vendor may be taken to have agreed to postpone his lien: see *Barclays Bank plc v Estates and Commercial Ltd* [1997] 1 WLR 415, 74 P & CR 30, CA; and PARA 288.

2 *White v Wakefield* (1835) 7 Sim 401 at 417.

3 *Rimmer v Webster* [1902] 2 Ch 163, where the result was treated as an application of the principle of agency; *Tsang Chuen v Li Po Kwai* [1932] AC 715, PC. See also *Perry Herrick v Attwood* (1857) 2 De G & J 21; PARA 284; and **COMPANIES** vol 14 (2009) PARA 401; **EQUITY** vol 16(2) (Reissue) PARA 569; **ESTOPPEL** vol 16(2) (Reissue) PARAS 1050, 1067.

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286. Beneficiary and trustee's assignees.

Where a trust has been constituted, the title deeds are properly left in the trustee's custody; and if he uses them, in breach of trust, for the purpose of creating an equitable incumbrance, the beneficiary's title will prevail over that of the incumbrancer¹. If, however, the trustee is authorised to dispose of the property, and purports to dispose of it in accordance with his authority, the beneficiary will be postponed to an equitable mortgagee² unless the disposition is in substance one not authorised by the trust³.

1 *Shropshire Union Rlys and Canal Co v R* (1875) LR 7 HL 496; *Bradley v Riches* (1878) 9 ChD 189; *Burgis v Constantine* [1908] 2 KB 484, CA; *Hill v Peters* [1918] 2 Ch 273 at 278; *Coleman v London County and Westminster Bank Ltd* [1916] 2 Ch 353 at 361. See also **EQUITY** vol 16(2) (Reissue) PARA 569. It is otherwise where the conveyance to the trustee contains a representation that he is absolute owner: *Re King's Settlement, King v King* [1931] 2 Ch 294. Where the trustee improperly invests the trust fund in the purchase of land, the beneficiaries are entitled to follow it into the land; and this is not a mere equity, but gives them an equitable interest in the land, so that they will not be postponed to an equitable incumbrancer under the trustee without notice (*Cave v Cave* (1880) 15 ChD 639), although a different view has prevailed in Ireland, and the beneficiaries in such a case are treated as having an inferior equity to the incumbrancer (*Re Ffrench's Estate* (1887) 21 LR Ir 283 at 312, Ir CA; *Re Sloane's Estate* [1895] 1 IR 146 at 165; *Bank of Ireland v Cogry Spinning Co* [1900] 1 IR 219). An executor or trustee disposing of the estate or trust funds to a purchaser for value without notice has generally been treated as giving the purchaser an equity superior to that of the beneficiaries: *Bourke v Lee* [1904] 1 IR 280; *Re Bobbett's Estate, Nugent Petitioner* [1904] 1 IR 461. The Irish decisions were followed with reluctance in *Scott v Scott* [1924] 1 IR 141.

2 *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192. See also **EQUITY** vol 16(2) (Reissue) PARA 569.

3 *Capell v Winter* [1907] 2 Ch 376.

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(iii) Postponement

287. Express postponement.

Ordinarily where there are two mortgages of the same property the mortgagees can vary the order of priority of their mortgages without the mortgagor's consent. Since the mortgagor can recover the mortgaged property only on payment of the debts secured by both mortgages, his right to recover the mortgaged property is not adversely affected by a variation in priorities. Although a mortgagor who wishes to have the secured debts satisfied in a particular order can require a specific term to be inserted in the mortgage preventing the priorities of the mortgages from being altered, a reference in the first mortgage to the charge being a first charge merely describes the nature of the security and confers no contractual right on the mortgagor to have that debt satisfied first¹. A mortgagee of registered land cannot, however, gain priority over an existing protected or statutory tenant in occupation of a dwelling house by inducing him to sign a form of consent².

1 *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472, [1991] 4 All ER 989, PC. As to the effect of an agreement postponing a fixed charge to a floating charge see *Re Portbase Clothing Ltd* [1993] Ch 388, [1993] 3 All ER 829. An agreement to limit the priority of a charge to a specific sum with interest thereon gives priority for such interest as is secured by the charge, whether compound or simple: see *Whitbread plc v UCB Corporate Services Ltd* [2000] 3 EGLR 60, [2000] 35 EG 136, CA.

2 *Woolwich Building Society v Dickman* [1996] 3 All ER 204, 72 P & CR 470, CA.

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288. Implied postponement.

A party with an equitable charge over or an interest in property can be taken to have agreed to the postponement of his interest in favour of any party who is allowed to his knowledge to purchase or take a charge over the land on the faith that it is unincumbered¹. Thus an unpaid vendor's lien is postponed to the equitable interest of the sub-purchasers where the vendor allows his agent to deal with the land on the footing that the purchasers are selling as absolute owners free from the lien², and a person claiming a beneficial interest in a property owned by another is treated as having agreed to postpone his interest to a mortgage which he knows will be granted to secure funds required to provide the purchase price of the property³, or to that of a replacement mortgage on no less favourable terms effected without his knowledge⁴.

1 *Barclays Bank plc v Estates and Commercial Ltd* [1997] 1 WLR 415, 74 P & CR 30, CA; *Bristol and West Building Society v Henning* [1985] 2 All ER 606, [1985] 1 WLR 778, CA. But cf *Skipton Building Society v Clayton* (1993) 66 P & CR 223, 25 HLR 596, CA, where the question was treated as one of estoppel.

2 *Kettlewell v Watson* (1884) 26 ChD 501, CA, explained in *Barclays Bank plc v Estates and Commercial Ltd* [1997] 1 WLR 415, 74 P & CR 30, CA.

3 *Bristol and West Building Society v Henning* [1985] 2 All ER 606, [1985] 1 WLR 778, CA; *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244, [1987] Fam Law 121, CA; *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL (obiter).

4 *Equity and Law Home Loans Ltd v Prestidge* [1992] 1 All ER 909, [1992] 1 WLR 137, CA.

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(iv) Estoppel and Subrogation

289. Estoppel.

A person entitled to a charge over or an interest in property who has, knowingly or unknowingly, allowed or encouraged a subsequent incumbrancer to assume to his detriment that his security has priority may be estopped from asserting priority if it would be unconscionable for him to do so¹. Thus a mortgagee will be postponed if he has returned the deeds to, or left them with, the mortgagor for the purposes of enabling the mortgagor to raise money on them, notwithstanding that the limit which he has assigned for the loan has been exceeded². An agent who negotiates with the mortgagee on behalf of the mortgagor is estopped from asserting any adverse interest of his own in the property which he does not disclose³. A person claiming an interest in property who so conducts himself as to give the prospective mortgagee reasonable grounds for believing that he consents to the creation of a charge in priority to his interest will be estopped from asserting priority over the charge⁴.

1 *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133n at 151-152, [1981] 1 All ER 897 at 915-916 per Oliver J. See also *Lancashire Mortgage Corp Ltd v Scottish & Newcastle plc* [2007] EWCA Civ 684, [2007] All ER (D) 68 (Jul) in which the principle in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* above was applied.

2 See PARAS 283, 288.

3 *Midland Bank Ltd v Farmpride Hatcheries Ltd* [1981] 2 EGLR 147, CA.

4 *Skipton Building Society v Clayton* (1993) 66 P & CR 223, 25 HLR 596, CA; *Hardy v Fowle* [2007] EWHC 2423 (Ch); and see PARAS 283, 288.

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290. Subrogation.

A lender who advances money which is used to discharge a security will be subrogated to the rights under that security and obtain priority over incumbrances subsequent to that security if:

- 14 (1) the subsequent incumbrancer has been enriched at the lender's expense;
- 15 (2) such enrichment was unjust; and
- 16 (3) there are no policy reasons for denying a remedy¹.

1 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL; and see PARAS 384-385.

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(5) PRIORITY OF STATUTORY CHARGES

291. Charging orders.

The Land Charges Act 1972 and the Land Registration Act 2002 apply in relation to charging orders¹ as they apply in relation to other orders or writs issued or made for the purposes of enforcing judgments². In the case of unregistered land, a charging order over the legal estate is registrable but not if it is over a beneficial interest alone³. In the case of registered land, a charging order affecting a registered estate⁴ may be protected by notice⁵, but not if it is over a beneficial interest alone⁶. It seems that such a charge takes effect subject to any prior mortgages, whether legal or equitable, affecting the estate or interest charged⁷. A caution registered to protect a charging order confers no priority and the rule in *Dearle v Hall*⁸ does not relate to a judgment creditor⁹.

1 As to charging orders see PARA 242.

2 See the Charging Orders Act 1979 s 3(2) (amended by the Land Registration Act 2002 s 133, Sch 11 para 15); PARA 242; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1481.

3 See the Land Charges Act 1972 s 6(1)(a), (1A); PARA 242; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 654. See also *Perry v Phoenix Assurance plc* [1988] 3 All ER 60, [1988] 1 WLR 940.

4 As to the meaning of 'registered estate' see PARA 159 note 7.

5 See the Land Registration Act 2002 ss 32, 87; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 995, 1019-1020.

6 See the Land Registration Act 2002 s 33(a); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 996.

7 *Whitworth v Gaugain* (1846) 1 Ph 728; *Legg v Mathieson* (1860) 2 Giff 71; *Kinderley v Jervis* (1856) 22 Beav 1; *Eyre v M'Dowell* (1861) 9 HL Cas 619; *Wickham v New Brunswick and Canada Rly Co* (1865) LR 1 PC 64; *Chung Khiaw Bank Ltd v United Overseas Bank* [1970] AC 767, [1970] 2 WLR 858, PC; *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1995] 2 All ER 973 (affd on different grounds [1997] Ch 107, [1996] 3 All ER 215, CA). As to priorities of equitable interests affecting registered land see the Land Registration Act 2002 ss 28-30; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 934-936.

8 See *Dearle v Hall* (1828) 3 Russ 1; and **CHOSSES IN ACTION** vol 13 (2009) PARA 43.

9 *Clark v Chief Land Registrar* [1994] Ch 370, [1994] 4 All ER 96, CA; *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA. See also PARA 242.

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292. Other statutory charges.

Various statutory rights, liabilities, claims and penalties are secured by charge upon land, usually as local land charges¹ which have priority over both existing and future incumbrances². The nature, effect and priority of a statutory charge depend on the provisions of the statute in question: statutory charges on 'the land' or 'the premises' confer priority over existing and future incumbrances³.

1 See eg the Housing Act 2004 s 37 (improvement notices and prohibition orders); and **HOUSING** vol 22 (2006 Reissue) PARA 405.

² See the Local Land Charges Act 1975 s 10(1); the Land Registration Act 2002 ss 29, 30, Sch 3 para 6; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 694; **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 962.

³ *Paddington Borough Council v Finucane* [1928] Ch 567; *Bristol Corp'n v Virgin* [1928] 2 KB 622; *Westminster City Council v Haymarket Publishing Ltd* [1981] 2 All ER 555, [1981] 1 WLR 677, CA.

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(6) PRIORITY BETWEEN MORTGAGEES AND TENANTS OF THE MORTGAGOR

293. Leases created before the mortgage.

A mortgagee of registered¹ land is bound only by leases which fall within the categories of overriding interests² or are protected by notice³. The only legal leases which are now overriding are those granted for a term not exceeding seven years from the date of the grant, except where they are required to be registered⁴. A mortgagee is not bound by a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition⁵. A mortgagee of registered land is also bound by an interest belonging at the time of the disposition to a person in actual occupation⁶, so far as relating to land of which he is in actual occupation, except for:

- 17 (1) an interest under a settlement under the Settled Land Act 1925⁷;
- 18 (2) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so⁸;
- 19 (3) an interest which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition⁹, of which the person to whom the disposition is made does not have actual knowledge at that time¹⁰; and
- 20 (4) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition¹¹.

An example of such an interest is an agreement for a lease or a statutory tenancy granted by a mortgagor holding the legal estate at the time of the grant of the lease¹². A mortgagee is not bound by a tenancy if the tenant consents to the grant of the mortgage or is estopped from asserting priority¹³, unless the tenancy is statutory or protected¹⁴. Nor is a mortgagee bound by a tenancy if the mortgage merely replaces and varies a previous mortgage granted before the lease¹⁵. A legal mortgage of land in lease at the date of the mortgage creates a term of years, and vests in the mortgagee the immediate reversion on the lease¹⁶.

¹ As to the meaning of 'registered' see PARA 155 note 3.

² See the Land Registration Act 2002 ss 28-30, Sch 3 para 1; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 934-936, 962.

³ See the Land Registration Act 2002 s 32; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 995.

⁴ See the Land Registration Act 2002 Sch 3 para 1; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 962.

5 See the Land Registration Act 2002 s 4(1)(d), Sch 3 para 1; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 827.

6 Under the Land Registration Act 1925 (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 803) the holder of a registered legal charge upon registered land was not bound by a prior oral agreement for a lease granted by the then prospective mortgagor if the tenant under the agreement had not entered into possession at the date when the charge took effect: see *City Permanent Building Society v Miller* [1952] Ch 840, [1952] 2 All ER 621, CA (where the oral agreement was held not to constitute an overriding interest within the Land Registration Act 1925 s 70(1)(k) (as originally enacted), despite the definition of lease in s 3(x)); and see also *Hughes v Waite* [1957] 1 All ER 603, [1957] 1 WLR 713.

7 Land Registration Act 2002 Sch 3 para 2(a). As to settlements under the Settled Land Act 1925 see **SETTLEMENTS** vol 42 (Reissue) PARA 601 et seq.

8 Land Registration Act 2002 Sch 3 para 2(b).

9 Land Registration Act 2002 Sch 3 para 2(c)(i).

10 Land Registration Act 2002 Sch 3 para 2(c)(ii).

11 Land Registration Act 2002 Sch 3 para 2(d).

12 *Woolwich Building Society v Dickman* [1996] 3 All ER 204, 72 P & CR 470, CA; *Barclays Bank v Zarovabli* [1997] Ch 321, [1997] 2 All ER 19. Where the mortgagors are themselves in occupation under such a lease at the time when the mortgagee seeks possession against them and against a third person to whom they have conveyed the legal estate in fee simple in the mortgaged land, they are not estopped from setting up the lease merely because in the conveyance to the third person they recited that they were seised in unincumbered fee simple in possession: *District Bank Ltd v Webb* [1958] 1 All ER 126, [1958] 1 WLR 148.

13 *Skipton Building Society v Clayton* (1993) 66 P & CR 223, 25 HLR 596, CA. See also PARAS 289-290.

14 *Woolwich Building Society v Dickman* [1996] 3 All ER 204, 72 P & CR 470, CA.

15 *Walthamstow Building Society v Davies* 60 P & CR 99, (1989) 22 HLR 60, CA.

16 *Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd* [1989] 1 All ER 1161, [1989] 1 WLR 800, CA. Cf *Neale v Mackenzie* (1836) 1 M & W 747, Ex Ch; *Harmer v Bean* (1853) 3 Car & Kir 307. A charge by way of legal mortgage has the same effect: see the Law of Property Act 1925 s 87(1); and PARA 191. As to the rights and liabilities of the mortgagor under the lease see PARAS 297, 352.

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294. Purported legal leases granted by a purchaser.

If a purchaser purports to grant a legal tenancy¹ before completion, thus granting it at a time when he has only an equitable interest, and if he subsequently takes a conveyance of the premises, the estoppel created by the grant is fed by the legal interest acquired on conveyance and the tenancy becomes a legal tenancy².

Where both a mortgage and a tenancy have been granted by a purchaser of property before he has acquired the legal estate, it seems that the doctrine of feeding the estoppel does not operate to render the tenancy valid against the mortgagee³.

If the purchase is completed simultaneously with a mortgage securing an advance made by the mortgagee to provide part of the purchase price, the mortgagee is not bound by the tenancy since the transactions of acquiring the legal estate and granting the charge are one indivisible transaction and there is no 'scintilla temporis' during which the legal estate vests in the purchaser free of the charge⁴. If, however, the mortgage is not granted until after completion of

the purchase, the mortgagee is bound by the tenancy which became a legal tenancy on completion⁵.

1 le by deed or a valid parol lease: see the Law of Property Act 1925 ss 52, 54(2); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 99 et seq.

2 See **ESTOPPEL** vol 16(2) (Reissue) PARA 1033.

3 *Rust v Goodale* [1957] Ch 33, [1956] 3 All ER 373.

4 *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL (overruling *Church of England Building Society v Piskor* [1954] Ch 553, [1954] 2 All ER 85, CA, on this point; and approving *Re Connolly Bros Ltd, Wood v Connolly Bros Ltd (No 2)* [1912] 2 Ch 25, CA; *Coventry Permanent Economic Building Society v Jones* [1951] 1 All ER 901, [1951] WN 218); *Nationwide Anglia Building Society v Ahmed and Balakrishnan* (1995) 70 P & CR 381, [1995] NPC 77, CA.

5 See PARA 293. See also *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA (registered land).

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295. Unauthorised leases granted between execution and registration of the mortgage.

A charge of registered land does not vest the legal estate in the mortgagee until completed by registration¹. A lease of registered land vests a legal estate in the tenant free from an unregistered charge, even if it was granted in breach of the charge². A statutory tenancy arising on the termination of such a lease is also binding on the mortgagee³. Accordingly charges should be lodged for registration promptly⁴.

1 *Barclays Bank plc v Zarovabli* [1997] Ch 321, [1997] 2 All ER 19.

2 *Barclays Bank plc v Zarovabli* [1997] Ch 321, [1997] 2 All ER 19. See also the Land Registration Act 2002 s 30(2)(b); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 936.

3 *Barclays Bank plc v Zarovabli* [1997] Ch 321, [1997] 2 All ER 19.

4 *Barclays Bank plc v Zarovabli* [1997] Ch 321, [1997] 2 All ER 19.

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296. Unauthorised leases granted after the mortgage.

A lease granted by a mortgagor after a mortgage without statutory or express power is good by estoppel between mortgagor and lessee¹, but void as between mortgagee and lessee², although a mortgagee who purchases the equity of redemption may be bound by tenancy agreements made by the mortgagor³. The lessee is not protected against a legal mortgagee by the rent restriction legislation⁴. A lease which is void as between the mortgagee and lessee is void against a purchaser on the mortgagee exercising his power of sale without any express

assurance of the mortgagee's rights against the mortgagor⁵. A lease may be established against the mortgagee by his conduct⁶. The lessee can, however, protect himself from eviction⁷ by the mortgagee by redeeming the mortgage⁸. The reversion by estoppel in the lessor passes by assignment, so that an assignee of the equity of redemption can enforce the lessee's covenants⁹. A mortgagee is not entitled to possession against a tenant if acting in bad faith pursuant to a collusive arrangement with and for the benefit of the lessor who would not otherwise be able to obtain possession¹⁰.

1 *Alchorne v Gomme* (1824) 2 Bing 54; *Doe d Lord Downe v Thompson, Lord Downe v Thompson* (1847) 9 QB 1037; *Cuthbertson v Irving* (1860) 6 H & N 135 at 139, Ex Ch; *Hartcup & Co v Bell* (1883) Cab & El 19.

2 *Keech v Hall* (1778) 1 Doug KB 21; *Pope v Biggs* (1829) 9 B & C 245 at 253; *Trent v Hunt* (1853) 9 Exch 14; *Cuthbertson v Irving* (1860) 6 H & N 135, Ex Ch (explained in *Universal Permanent Building Society v Cooke* [1952] Ch 95 at 102, [1951] 2 All ER 893 at 896-897, CA); *Lows v Telford* (1876) 1 App Cas 414 at 425, HL; *Hassard v Fowler* (1892) 32 LR Ir 49; *Rust v Goodale* [1957] Ch 33 at 44, [1956] 3 All ER 373 at 380; *Hughes v Waite* [1957] 1 All ER 603, [1957] 1 WLR 713; *Taylor v Ellis* [1960] Ch 368, [1960] 1 All ER 549; *Sadiq v Hussain* [1997] NPC 19, CA.

3 *Smith v Phillips* (1837) 1 Keen 694, considered in *Rust v Goodale* [1957] Ch 33, [1956] 3 All ER 373; *O'Loughlin v Fitzgerald* (1873) 7 IR Eq 483.

4 *Dudley and District Benefit Building Society v Emerson* [1949] Ch 707, [1949] 2 All ER 252, CA (protected tenant); *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA (statutory tenant); *Barclays Bank v Zarovabli* [1997] Ch 321, [1997] 2 All ER 19.

5 *Rust v Goodale* [1957] Ch 33 at 44, [1956] 3 All ER 373 at 380 per Harman J.

6 *Lysaght v Callinan* (1831) Hayes 141.

7 As to the mortgagee's rights against a tenant under a tenancy not binding on the mortgagee see PARA 408.

8 *Tarn v Turner* (1888) 39 ChD 456, CA.

9 *Cuthbertson v Irving* (1860) 6 H & N 135, Ex Ch. See further **ESTOPPEL** vol 16(2) (Reissue) PARA 1016.

10 *Quennell v Maltby* [1979] 1 All ER 568, [1979] 1 WLR 318, CA. See also *Sadiq v Hussain* [1997] NPC 19, CA.

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297. Statutory leases granted after the mortgage.

The statutory power of leasing¹, if not excluded², enables the mortgagor to create a term out of the estate of the mortgagee so as to convert that estate into one expectant on the term granted by the lease³. The mortgagee is bound by a lease thus made by the mortgagor⁴ so long as the statutory requirements are complied with⁵ and, on giving notice to the lessee to pay the rent to him, and on default by the lessee, he can sue for it and bring a claim for breach of any covenant contained in the lease; and these rights of the mortgagee are not affected by a collateral agreement between the mortgagor and the lessee after the date of the mortgage⁶.

1 See PARA 346.

2 See PARA 347.

3 *Municipal Permanent Investment Building Society v Smith* (1888) 22 QBD 70 at 72, CA, per Fry LJ.

4 Eg a mortgagee cannot block the lessee's lights: *Wilson v Queen's Club* [1891] 3 Ch 522; *Turner v Walsh* [1909] 2 KB 484, CA.

5 See PARAS 346-350.

6 See PARA 423. See also *Municipal Permanent Investment Building Society v Smith* (1888) 22 QBD 70, CA.

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298. Leases granted for the purpose of prejudicing a mortgagee.

A lease granted for the purpose of ensuring that a mortgagee does not obtain possession of the property may be set aside even if the tenant agrees to pay the best rent reasonably obtainable¹.

1 See the Insolvency Act 1986 s 423; *Agricultural Mortgage Corp'n plc v Woodward* [1996] 1 FLR 226, [1995] 1 EGLR 1, CA; *Barclays Bank plc v Bean* [2004] 3 EGLR 71, [2004] 41 EG 152; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664 et seq.

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299. Leases granted with mortgagee's consent.

Where leasing is prohibited except with the mortgagee's consent, the onus of proving consent lies with the tenant¹. A mortgagee who has recognised the tenant as his tenant cannot treat him as a trespasser and evict him². A provision in the mortgage that a lessee is not to be concerned to see that consent for letting had been given may estop the mortgagee from asserting that the lease has been granted without consent³.

Recognition by the mortgagee of a tenant is a question of fact; receipt of money from a tenant is not conclusive, for it may have been received by the mortgagee as part of the principal, or as interest. An encouragement by the mortgagee to the tenant to spend money may be evidence of a recognition of the lease⁴. No privity can be assumed between the tenant and the mortgagee, but evidence is admissible to prove that the mortgagor in granting the lease acted as agent for the mortgagee⁵.

Receipt of rent by a receiver appointed under statute⁶ does not create a tenancy between the tenant and mortgagee, but, notwithstanding the receivership, such a tenancy might be created if the facts otherwise show that the mortgagee consented to accept the mortgagor's tenant as his own⁷.

Mere inaction by the mortgagee with knowledge of an unauthorised letting does not amount to recognition by conduct⁸.

1 *Taylor v Ellis* [1960] Ch 368, [1960] 1 All ER 549.

2 *Underhay v Read* (1887) 20 QBD 209, CA; *Corbett v Plowden* (1884) 25 ChD 678, CA.

3 *Lever Finance Ltd v Needleman Property Trustee* [1956] Ch 375, [1956] 2 All ER 378, distinguishing *Dudley and District Benefit Building Society v Emerson* [1949] Ch 707, [1949] 2 All ER 252, CA.

4 *Doe d Parry v Hughes* (1847) 11 Jur 698; *Doe d Rogers v Cadwallader* (1831) 2 B & Ad 473; *Evans v Elliot* (1838) 9 Ad & El 342. See also *Doe d Whitaker v Hales* (1831) 7 Bing 322; *Doe d Bowman v Lewis* (1884) 13 M & W 241; *Doe d Wilkinson v Goodier* (1847) 10 QB 957; *Barclays Bank Ltd v Kiley* [1961] 2 All ER 849, [1961] 1 WLR 1050.

5 *Corbett v Plowden* (1884) 25 ChD 678 at 681, CA, per Lord Selborne LC.

6 le under the Law of Property Act 1925 s 109: see PARA 476.

7 See *Stroud Building Society v Delamont* [1960] 1 All ER 749, [1960] 1 WLR 431; *Chatsworth Properties Ltd v Effiom* [1971] 1 All ER 604, [1971] 1 WLR 144, CA; *Mann v Nijar* (1998) 32 HLR 223, CA.

8 *Re O'Rourke's Estate* (1889) 23 LR Ir 497; *Parker v Braithwaite* [1952] 2 All ER 837, [1952] WN 504; *Taylor v Ellis* [1960] Ch 368, [1960] 1 All ER 549; *Mann v Nijar* (1998) 32 HLR 223, CA.

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300. Leases granted by the mortgagee.

The mortgagee and tenant may agree to have as between themselves the relationship of landlord and tenant¹. Such an agreement destroys the old lease between the mortgagor and tenant and creates a tenancy between mortgagee and tenant². Payment of rent by a tenant to the mortgagee is evidence of a new tenancy³. The terms of the tenancy are ascertained by evidence and inference from the facts, and are not necessarily those on which the tenant held under the mortgagor⁴. Notice by the mortgagee to the lessee to pay rent to him and payment in accordance with the notice would be such evidence⁵. A mortgagee cannot, however, by notice to a tenant compel him to be his tenant, and the continuance in possession after notice from the mortgagee is no evidence of an agreement that he would become tenant⁶.

1 *Brown v Storey* (1840) 1 Man & G 117 at 126 per Tindal CJ.

2 *Corbett v Plowden* (1884) 25 ChD 678 at 681-682, CA.

3 *Partington v Woodcock* (1835) 6 Ad & El 690; *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307 at 315; *Mann v Nijar* (1998) 32 HLR 223, CA. As to the circumstances in which a periodic tenancy arises by implication see now *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368, CA.

4 *Keith v R Gancia & Co Ltd* [1904] 1 Ch 774 at 783, CA; and see *Oakley v Monck* (1866) LR 1 Exch 159, Ex Ch.

5 *Corbett v Plowden* (1884) 25 ChD 678, CA; *Keith v R Gancia & Co Ltd* [1904] 1 Ch 774, CA; *Chatsworth Properties Ltd v Effiom* [1971] 1 All ER 604, [1971] 1 WLR 144, CA (payment to receiver).

6 *Evans v Elliot* (1838) 9 Ad & El 342; *Biner v Walters* (1869) 20 LT 326; *Towerson v Jackson* [1891] 2 QB 484, CA, disapproving on this point *Underhay v Read* (1887) 20 QBD 209, CA. See also *Brown v Storey* (1840) 1 Man & G 117. It seems that *Pope v Biggs* (1829) 9 B & C 245 and *Waddilove v Barnett* (1836) 4 Dowl 347 must be treated as overruled on this point by *Evans v Elliot* above.

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301. Lease granted pursuant to statutory right of enfranchisement.

A tenant may be entitled to be granted a new lease¹ despite the fact that the grant of the existing lease was subsequent to the creation of a mortgage on the landlord's interest and not authorised as against the persons interested in the mortgage². A lease so granted is deemed to be authorised as against the persons interested in any mortgage on the landlord's interest, however created or arising, and is binding on those persons³. However, such a lease is not binding on the persons interested in any such mortgage if the existing lease is granted after 1 November 1993⁴ and, being granted subsequent to the creation of the mortgage, would not otherwise⁵ be binding on the persons interested in the mortgage⁶.

1 As to the statutory right of enfranchisement see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1671 et seq.

2 See the Leasehold Reform, Housing and Urban Development Act 1993 s 58(1); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1721.

3 See the Leasehold Reform, Housing and Urban Development Act 1993 s 58(1)(a), (b); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1721.

4 Ie the date on which the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) was brought into force by the Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134.

5 Ie apart from the Leasehold Reform, Housing and Urban Development Act 1993 s 58(1); see s 58(2).

6 See the Leasehold Reform, Housing and Urban Development Act 1993 s 58(2); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1721.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(1) NATURE OF EQUITY OF REDEMPTION/302. The nature of the equity of redemption.

5. THE EQUITY OF REDEMPTION

(1) NATURE OF EQUITY OF REDEMPTION

302. The nature of the equity of redemption.

At law, a mortgage of land formerly took the form of a conveyance to the creditor on condition that if the money was repaid on the specified date, the creditor would reconvey the land but if the condition was not strictly complied with the debtor would lose the land forever and remain liable for the debt. The Court of Chancery intervened to permit the debtor to redeem the mortgage on performance of the conditions, notwithstanding his failure to do so by the specified date, and this right, known as the 'equity of redemption', arose to provide relief against penalties¹. This right of a mortgagor to redeem his property was, until the changes made by the Law of Property Act 1925, not a mere right, but an equitable estate or interest in the property mortgaged². Although the mortgagor had mortgaged his property, he might still deal with it in any way consistent with the rights of the mortgagee³. It is still true that the mortgagor may deal with the property in any way that is consistent with the rights of the mortgagee. He has still also an equitable right to redeem the property after the day fixed for payment has gone by, but his right or equity of redemption is no longer strictly an equitable estate or interest, although it is still in the nature of an equitable interest⁴. Under the present system of creating legal mortgages, the mortgagee takes only a term of years, leaving the

legal freehold reversion expectant on the mortgage term in the mortgagor⁵. Accordingly, the mortgagor retains his legal freehold estate and cannot at the same time have an equitable estate co-extensive with it⁶. Therefore, instead of his equity of redemption constituting an equitable estate or interest, it subsists only as a right in equity to redeem the property, this right being attached to his legal freehold estate.

1 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL. As to the principle that a right to redeem is a necessary incident of a mortgage see PARA 107. As to the effect of non-payment at common law see Littleton's Tenures s 322; Bac Abr, Mortgage (E) 1; and PARA 107. See also **EQUITY** vol 16(2) (Reissue) PARA 605.

2 *Santley v Wilde* [1899] 2 Ch 474 at 475, CA; *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 48-50, 52, HL; *Re Clancarty* [1921] 2 IR 377; *Re Sir Thomas Spencer Wells, Swinburne-Hanham v Howard* [1933] Ch 29 at 44-48, 52, CA; *Lloyd v Lander* (1821) 5 Madd 282 at 289. See also **EQUITY** vol 16(2) (Reissue) PARA 605.

3 *Casborne v Scarfe* (1738) 1 Atk 603; *Heath v Pugh* (1881) 6 QBD 345 at 360, CA (affd sub nom *Pugh v Heath* (1882) 7 App Cas 235, HL); *Jennings v Jordan* (1881) 6 App Cas 698 at 714 per Lord Blackburn; *Tarn v Turner* (1888) 39 ChD 456 at 460 per Kekewich J (affd (1888) 39 ChD 456, CA). See also *Pawlett v A-G* (1667) Hard 465 at 469. A mortgagor was not after execution of a legal mortgage 'seised' of the land according to the common law and, therefore, was not liable to the burdens of tenure incident to customary freeholds, such as a heriot due to the lord of a manor on the death of a tenant seised of a tenement in the manor: *Copestake v Hoper* [1908] 2 Ch 10, CA. As to tenure incident to customary freeholds see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 643-644; **REAL PROPERTY** vol 39(2) (Reissue) PARAS 5 et seq, 32.

4 See the Law of Property Act 1925 s 1(3); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 46.

5 See PARAS 190-191. The legal estate of freehold is an estate in fee simple absolute in possession within the meaning of the Law of Property Act 1925 s 1(1): see **REAL PROPERTY** vol 39(2) (Reissue) PARA 45. The existence of the term does not prevent the reversion on the term being 'in possession': see **REAL PROPERTY** vol 39(2) (Reissue) PARA 45. Under s 1(5), legal estates can exist concurrently, that is, the estate of freehold exists as a legal estate concurrently with the term, and for this purpose it must be treated as in possession notwithstanding that it is subject to the term: see **REAL PROPERTY** vol 39(2) (Reissue) PARA 47.

6 See *Selby v Alston* (1797) 3 Ves 339; *Re Selous, Thomson v Selous* [1901] 1 Ch 921.

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303. Right of redemption on mortgage of chattels.

On a mortgage of chattels, even after the mortgagee has seized the goods, the mortgagor can still redeem so long as the goods are in the mortgagee's possession¹. The right to redemption is incident to the contract of mortgage; it does not depend on the form of the transaction², and cannot be negated by contemporaneous agreement or even clogged³.

1 *Johnson v Diprose* [1893] 1 QB 512, CA. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1683. As to the distinction between a mortgage and a pledge of chattels see PARA 112.

2 *Sampson v Pattison* (1842) 1 Hare 533; *Wynne v Styan* (1847) 2 Ph 303; *Kirkwood v Thompson* (1865) 2 De GJ & Sm 613; *Re Alison, Johnson v Mounsey* (1879) 11 ChD 284, CA; *Banner v Berridge* (1881) 18 ChD 254; *Re Duke of Marlborough, Davis v Whitehead* [1894] 2 Ch 133. See also PARA 107. As to redemption of mortgages formerly made by way of trust for sale see *Chambers v Goldwin* (1801) 5 Ves 834; *Wicks v Scrivens* (1860) 1 John & H 215.

3 See PARA 317 et seq.

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(2) PERSONS ENTITLED TO REDEEM

304. Persons who can redeem.

The mortgagor and all persons having any interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem¹.

Until he has absolutely assigned his equity of redemption, the mortgagor can redeem the mortgaged property, and a mortgagor who has entirely parted with the equity of redemption nevertheless, upon being sued for payment of the mortgage debt by the mortgagee, acquires a new right to redeem². It is immaterial to the mortgagee, so far as the mortgagor's right to redeem is concerned, whether the mortgagor's title to the mortgaged property is good or bad as the mortgagee is not entitled to dispute it³. An assignee of a mortgage is in the same position as the mortgagee⁴.

1 *Pearce v Morris* (1869) 5 Ch App 227 at 229; *Tarn v Turner* (1888) 39 ChD 456, 57 LJCh 452 (affd (1888) 39 ChD 456, CA); *Green v Wynn* (1869) 4 Ch App 204 at 207.

2 *Dashwood v Blythway* (1729) 1 Eq Cas Abr 317; *Lockhart v Hardy* (1846) 9 Beav 349; *Palmer v Hendrie* (1859) 27 Beav 349 (subsequent proceedings *Palmer v Hendrie (No 2)* (1860) 28 Beav 341); *Walker v Jones* (1866) LR 1 PC 50 at 61; *Kinnaird v Trollope* (1888) 39 ChD 636 at 645 per Stirling J.

3 *Tasker v Small* (1837) 3 My & Cr 63 at 70 per Lord Cottenham LC.

4 *Walker v Jones* (1866) LR 1 PC 50 at 66. As to the corresponding estoppel binding the mortgagor see **ESTOPPEL** vol 16(2) (Reissue) PARA 1044.

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305. Persons claiming under the mortgagor.

The following persons claiming under the mortgagor can redeem:

- 21 (1) an assignee of the equity of redemption, including a volunteer¹;
- 22 (2) a subsequent incumbrancer²;
- 23 (3) a tenant for years under a lease made subsequent to the mortgage which the mortgagee refuses to confirm³; and
- 24 (4) a surety on payment by himself or refusal by the principal debtor to discharge the mortgage debt, or if the surety has mortgaged his own estate as security for the debt⁴, but not where the surety has given up his right to subrogation⁵.

A statutory tenant has no right to redeem⁶. Where mortgages on several plots have been consolidated and the mortgagor has conveyed the property to different purchasers, the purchasers are entitled, in foreclosure proceedings by the mortgagee, to redeem in the sequence of the dates of the instruments under which the purchasers acquired their interests⁷.

1 *Thorne v Thorne* (1683) 1 Vern 182; *Howard v Harris* (1683) 1 Vern 190 at 193. A voluntary transaction may, however, be set aside if made with the intent to defraud a subsequent purchaser, if made for the purpose of putting assets beyond the reach of, or otherwise prejudicing, a person who is making or may make a claim against him, and in certain circumstances where the donor becomes insolvent: see the Insolvency Act 1986 ss 238, 339, 423; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 654, 664; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 843 et seq.

2 *Fell v Brown* (1787) 2 Bro CC 276; *Marquis of Chomondeley v Lord Clinton* (1820) 2 Jac & W 1 at 134; *Faulkner v Daniel* (1843) 3 Hare 199; *Peto v Hammond* (1860) 29 Beav 91; *Tomlinson v Gregg* (1866) 15 WR 51. If a subsequent mortgagee loses his status as mortgagee by virtue of the provisions of the Limitation Act 1980 he ceases to be entitled to redeem: see *Cotterell v Price* [1960] 3 All ER 315, [1960] 1 WLR 1097. As to the Limitation Act 1980 see **LIMITATION PERIODS** vol 68 (2008) PARA 901.

3 *Keech v Hall* (1778) 1 Doug KB 21; *Tarn v Turner* (1888) 57 LJCh 452 (affd (1888) 39 ChD 456, CA).

4 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1142.

5 *Royal Trust Co Mortgage Corp v Nudnyk Holdings Ltd* (1974) 4 OR (2d) 721, 49 DLR (3d) 169, Ont HC.

6 *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA.

7 *Beevor v Luck*, *Beevor v Lawson* (1867) LR 4 Eq 537 at 548-549; *Loveday v Chapman* (1875) 32 LT 689.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/306. Spouse, civil partner or cohabitant with statutory right of occupation.

306. Spouse, civil partner or cohabitant with statutory right of occupation.

Where a spouse or civil partner becomes statutorily entitled¹ to occupy a dwelling house or any part of it, any payment or tender by that spouse or civil partner in or towards satisfaction of any liability of the other spouse or civil partner in respect of mortgage payments affecting the dwelling house is as good as if made or done by the other spouse or civil partner², but the mortgagee may treat any such payment as having been made by the other spouse or civil partner³. A former spouse, former civil partner, cohabitant or former cohabitant in favour of whom an occupation order is made is in the same position as a spouse or civil partner⁴. A spouse or former spouse, civil partner or former civil partner, cohabitant or former cohabitant may apply to be joined to any claim in which a mortgagee of a dwelling house seeks to enforce its security⁵. The statutory provisions do not affect any claim of a spouse or former spouse, civil partner or former civil partner, cohabitant or former cohabitant in occupation and actually making the payment against the other spouse, civil partner, cohabitant or former cohabitant to an interest in the dwelling house by virtue of the payment⁶.

1 See under the Family Law Act 1996 s 30: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 285.

2 See the Family Law Act 1996 s 30(3); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 285.

3 See the Family Law Act 1996 s 30(5); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 285.

4 See the Family Law Act 1996 ss 35(13), 36(13); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 297, 301.

5 See the Family Law Act 1996 ss 54(5), 55; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 285, 287.

6 See the Family Law Act 1996 ss 30(5), 35(13), 36(13); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 285, 297, 301. See also *Hastings and Thanet Building Society v Goddard* [1970] 3 All ER 954, [1970] 1 WLR 1544, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/307. Assignee during proceedings.

307. Assignee during proceedings.

An assignee of the equity of redemption during proceedings may apply for permission to be made a party to a claim for redemption¹. If he continues the claim, he is bound by all the proceedings in the claim², but he is under no obligation to make himself a party³.

¹ See CPR 19.3; *Practice Direction--Addition and Substitution of Parties* PD 19; and **CIVIL PROCEDURE** vol 11 (2009) PARA 211.

² *Bishop of Winchester v Paine* (1805) 11 Ves 194; *Wood v Surr* (1854) 19 Beav 551; *Campbell v Holyland* (1877) 7 ChD 166; *Re Parbola Ltd Blackburn Ltd, v Parbola Ltd* [1909] 2 Ch 437.

³ *Patch v Ward* (1867) 3 Ch App 203. See, however, *Three Rivers District Council v Governor and Co of the Bank of England* [1996] QB 292, [1995] 4 All ER 312, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/308. Judgment creditors.

308. Judgment creditors.

A judgment creditor who obtains a charging order¹ is in the same position to redeem as a subsequent incumbrancer². Every judgment creditor to whom the land of his mortgagor has been actually delivered in execution by registration of the order appointing a receiver³ has an interest in the equity of redemption⁴. He can redeem prior incumbrances, and is a necessary party to foreclosure and redemption⁵.

¹ See PARA 242.

² See PARA 305.

³ See PARA 562.

⁴ *Mildred v Austin* (1869) LR 8 Eq 220; *Earl of Cork v Russell* (1871) LR 13 Eq 210. See also *Hood Barrs v Cathcart* [1895] 2 Ch 411 at 414 per North J.

⁵ *Bishop of Winchester v Beavor* (1797) 3 Ves 314; *Rolleston v Morton* (1842) 1 Dr & War 171 at 191; *Adams v Paynter* (1844) 1 Coll 530; *Joyce v Joyce* (1846) 10 I Eq R 128. As to foreclosure see PARA 566 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/309. Land held on trust.

309. Land held on trust.

Where land is held on trust the trustees represent the beneficiaries and have in relation to the land subject to the trust the powers of an absolute owner¹, including the power to redeem a mortgage. This includes the case of an express trust, a former trust for sale² or a purported

settlement created after 1 January 1997³, and a trust which arises where land is conveyed to two or more persons as joint tenants or tenants in common⁴. The primary right of redemption is in the trustees, who may bring proceedings claiming redemption without joining the beneficiaries⁵. This appears to be within the rule that he who has the legal estate must redeem, unless a special case is made, such as that the trustees or executors are colluding with the mortgagees⁶. Should the trustees improperly refuse to redeem, any beneficiary may redeem or seek a direction that the trustees do so⁷.

1 See the Trusts of Land and Appointment of Trustees Act 1996 s 6; and **TRUSTS** vol 48 (2007 Reissue) PARA 1035.

2 Land held on trust for sale prior to 1 January 1997 (ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 was brought into force by the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974) has since that date been held on a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66.

3 See note 2. It is no longer possible to create a settlement for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(1); **SETTLEMENTS** vol 42 (Reissue) PARA 676.

4 See the Law of Property Act 1925 ss 34, 36; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 189 et seq.

5 As to representation of beneficiaries by trustees see CPR 19.7A; and **CIVIL PROCEDURE** vol 11 (2009) PARA 225. See also *Mills v Jennings* (1880) 13 ChD 639, CA; affd sub nom *Jennings v Jordan* (1881) 6 App Cas 698, HL (trustees of an equity of redemption sufficiently represent their beneficiaries in a redemption claim, if no direction to the contrary has been given by the court).

6 *Troughton v Binkes* (1801) 6 Ves 573 at 575.

7 *Hayim v Citibank NA* [1987] AC 730, [1987] 3 WLR 83, PC. A beneficiary may make an application relating to the exercise by trustees of land of any of their functions: see the Trusts of Land and Appointment of Trustees Act 1996 s 14; and **TRUSTS** vol 48 (2007 Reissue) PARA 1038. It does not appear that a beneficiary must necessarily obtain such a direction before exercising his right to redeem, although he must make out a case for redeeming: see *Troughton v Binkes* (1801) 6 Ves 573.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/310. Settled land.

310. Settled land.

Where the equity of redemption is incident to settled land¹, the land will be vested in the tenant for life or statutory owners as trustees for all persons beneficially interested², and the primary right of redemption is in him or them, although, if he or they improperly refuse to exercise that right, any persons beneficially interested can redeem³. The persons beneficially interested include life tenants and remaindermen, although perhaps not remaindermen beyond the first estate of inheritance⁴. A remainderman cannot redeem a mortgage on the settled property without the consent of the tenant for life⁵.

1 No settlement created after 1 January 1997 (ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 was brought into force by the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974) is a settlement for the purposes of the Settled Land Act 1925 although strict settlements in existence on that date continue to exist until there is no relevant property: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and **SETTLEMENTS** vol 42 (Reissue) PARA 676.

2 See the Settled Land Act 1925 ss 16, 107(1); and **SETTLEMENTS** vol 42 (Reissue) PARAS 767-769, 775.

3 See PARA 309.

4 *Gore v Stacpoole* (1813) 1 Dow 18, HL; *Anderson v Stather* (1845) 2 Coll 209; *Playford v Playford* (1845) 4 Hare 546.

5 *Ravald v Russell* (1830) You 9 at 21; *Raffety v King* (1836) 1 Keen 601; *Wicks v Scrivens* (1860) 1 John & H 215; *Prout v Cock* [1896] 2 Ch 808.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/311. Devolution on death.

311. Devolution on death.

Legatees whose legacies are charged on the mortgaged property can redeem to protect their legacies¹, but only through the personal representatives, unless a special case is made for redemption otherwise than through the personal representatives².

On the death of the mortgagor, the equity of redemption, and with it the right to redeem, devolves on his personal representatives³ and is exercisable by them until, by assent or conveyance, the equity becomes vested in the devisee or other person entitled.

1 *Faulkner v Daniel* (1843) 3 Hare 199 at 211; *Batchelor v Middleton* (1848) 6 Hare 75.

2 See CPR 19.7A; and **CIVIL PROCEDURE** vol 11 (2009) PARA 227.

3 See the Administration of Estates Act 1925 s 1; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 363 et seq. See also PARA 173.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/312. Persons lacking mental capacity, and children.

312. Persons lacking mental capacity, and children.

Where the right of redemption is vested in a person lacking mental capacity, it is exercisable by the court on his behalf¹.

A child cannot own a legal estate in land and the right of redemption will be in the trustees in whom the land is vested².

1 See the Mental Capacity Act 2005 Pt 2 (ss 45-61); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 750 et seq.

2 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 1; and **SETTLEMENTS** vol 42 (Reissue) PARA 677.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/313. Purchaser of equity of redemption.

313. Purchaser of equity of redemption.

A person who has contracted to purchase the equity of redemption can redeem, unless his rights under the contract are disputed¹, as can a claimant in proceedings for the administration of the mortgagor's estate who has obtained an order for sale².

1 *Pearce v Morris* (1869) 5 Ch App 227. See, however, *Tasker v Small* (1837) 3 My & Cr 63 at 69, where Lord Cottenham LC suggested that the purchase must have been completed.

2 *Christian v Field* (1842) 2 Hare 177.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/314. Bankrupts.

314. Bankrupts.

The bankrupt's estate, of which the equity of redemption of mortgaged property forms part¹, vests in his trustee in bankruptcy on his appointment taking effect². Neither the mortgagor while bankrupt³, nor his general creditors⁴, can redeem property which he has mortgaged. His trustee in bankruptcy has, however, certain powers to redeem such property⁵, but he cannot, after a foreclosure order has been made, claim to redeem the mortgaged property at the valuation put upon the security by the mortgagee in the bankruptcy proceedings unless a special direction has been inserted in the foreclosure order⁶, nor can he redeem where a secured creditor does not prove⁷.

1 See the Insolvency Act 1986 s 283; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216.

2 See the Insolvency Act 1986 s 306; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 391.

3 See *Spragg v Binkes* (1800) 5 Ves 583 at 590; *Rochfort v Battersby* (1849) 2 HL Cas 388. As to the bankrupt's right to redeem after discharge from or annulment of his bankruptcy see the Insolvency Act 1986 ss 281, 281A, 282, 330(5), Sch 4A Pt III; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 642 et seq.

4 *Troughton v Binkes* (1801) 6 Ves 573; *Heath v Chadwick* (1848) 2 Ph 649.

5 See the Insolvency Rules 1986, SI 1986/1925, r 6.117; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 564.

6 *Sanguinetti v Stuckey's Banking Co (No 2)* [1896] 1 Ch 502. See generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

7 *Re Vautin, ex p Saffery* [1899] 2 QB 549. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 490 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/315. Bona vacantia.

315. Bona vacantia.

If a mortgagor dies without next of kin and intestate in respect of any real estate, the Crown is beneficially entitled to the equity of redemption as bona vacantia¹. If a corporation which has

executed a mortgage is dissolved, the equity of redemption passes to the Crown as bona vacantia².

1 See the Administration of Estates Act 1925 s 46(1)(vi) (now set out in amended form in the Intestates' Estates Act 1952 s 4, Sch 1). As to intestate succession generally see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 583 et seq. As to bona vacantia see **CROWN PROPERTY** vol 12(1) (Reissue) PARAS 235-241.

2 See *Re Sir Thomas Spencer Wells, Swinburne-Hanham v Howard* [1933] Ch 29, CA (equity of redemption in leaseholds); and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1304. As to the statutory provision by which the rights and property of a company subject to the Companies Act 2006 are on its dissolution to be deemed to be bona vacantia see s 1012; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 933.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(2) PERSONS ENTITLED TO REDEEM/316. Persons claiming by possessory title.

316. Persons claiming by possessory title.

It seems that a person who has acquired a possessory title against the mortgagor can redeem¹. A stranger cannot redeem, but if a claimant has a prima facie title to an interest in the equity of redemption, a mortgagee who requires proof of such interest may lose his right to costs².

1 *Fletcher v Bird* (1896) Fisher's Law of Mortgage (6th Edn, 1910) 1025. See also **LIMITATION PERIODS** vol 68 (2008) PARA 1212.

2 *James v Biou* (1819) 3 Swan 234; *Lloyd v Wait* (1842) 1 Ph 61; *Smith v Green* (1844) 1 Coll 555; *Pearce v Morris* (1869) 5 Ch App 227. As to the mortgagee's right to costs see PARA 739 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(3) RESTRICTIONS ON RIGHT TO REDEEM/317. Clog on the equity of redemption.

(3) RESTRICTIONS ON RIGHT TO REDEEM

317. Clog on the equity of redemption.

On the principle of once a mortgage always a mortgage¹, a clog or fetter on the equity of redemption is void². No agreement between mortgagor and mortgagee contained in the mortgage can make a mortgage irredeemable³. This principle does not apply to debentures issued by a company which can be made irredeemable⁴, but a forfeiture clause under a lien on fully paid shares may be void as a clog⁵. No contract between a mortgagor and mortgagee made at the time of the mortgage, and as part of the mortgage transaction or, in other words, as one of the terms of the loan, can be valid if it provides that the mortgaged property is to become the absolute property of the mortgagee upon any event whatsoever⁶ or that the mortgagee is to have a share in the mortgaged property⁷. Subject to the statutory power to make debentures irredeemable⁸, it seems that the rule against clogging the equity of redemption applies to debentures with a floating charge issued by a company⁹; but debenture holders who have been paid off are not precluded by the rule from sharing in surplus assets, if it is so provided¹⁰.

1 See eg *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL; and PARA 107.

2 *Newcomb v Bonham* (1681) 1 Vern 7 at 8 per Lord Nottingham LC; *Santley v Wilde* [1899] 2 Ch 474, CA, per Lindley MR; *Salt v Marquess of Northampton* [1892] AC 1, HL; *Noakes & Co Ltd v Rice* [1902] AC 24 at 34, HL; *Samuel v Jarrah Timber and Wood Paving Corp* [1904] AC 323 at 329, HL; *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 53, HL, per Lord Parker; *Re Rainbow Syndicate Ltd*, *Owen v Rainbow Syndicate Ltd* [1916] WN 178; *Seton v Slade*, *Hunter v Seton* (1802) 7 Ves 265; *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd's Rep (Bank) 323. As to the effect of an omission from the deed of a proviso for redemption see PARA 221.

3 *Courtenay v Wright* (1860) 2 Giff 337. Cf *Howard v Harris* (1863) 1 Vern 190, where a restriction of redemption to the heirs male of the body did not prevent the mortgagor from redeeming.

4 See the Companies Act 2006 s 739; and **COMPANIES** vol 15 (2009) PARA 1305. An ordinary mortgage may be a debenture within this provision: see *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613, [1940] 2 All ER 401, HL.

5 *Hopkinson v Mortimer, Harley & Co Ltd* [1917] 1 Ch 646. See also **COMPANIES** vol 15 (2009) PARA 1214; **COMPANIES** vol 15 (2009) PARA 1326; **LIEN** vol 68 (2008) PARA 849.

6 *Mellor v Lees* (1742) 2 Atk 494; *Toomes v Conset* (1745) 3 Atk 261; *Vernon v Bethell* (1762) 2 Eden 110 at 113; *Spurgeon v Collier* (1758) 1 Eden 55; *Courtenay v Wright* (1860) 2 Giff 337; *Re Edwards' Estate* (1861) 11 I Ch R 367; *Lisle v Reeve* [1902] 1 Ch 53, CA (affd sub nom *Reeve v Lisle* [1902] AC 461, HL); *London and Globe Finance Corp v Montgomery* (1902) 18 TLR 661; *Samuel v Jarrah Timber and Wood Paving Corp* [1904] AC 323, HL.

7 *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd's Rep (Bank) 323.

8 See note 4.

9 See PARA 319 note 12.

10 *Re Cuban Land Co (1911) Ltd* [1921] 2 Ch 147. See also **COMPANIES** vol 15 (2009) PARA 1326.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(3) RESTRICTIONS ON RIGHT TO REDEEM/318. Postponement or limitation of right to redeem.

318. Postponement or limitation of right to redeem.

A contractual postponement of the right to redeem is enforceable unless: (1) it is a clog on the right to redeem¹; (2) it is oppressive or unconscionable²; or (3) it is designed to secure an unreasonable restraint of trade³. Mere unreasonableness does not make a term oppressive or unconscionable⁴ and the mere length of time of any postponement of the right to redeem is not in itself objectionable⁵. However, the debtor has a right to make payment at any time under a regulated agreement under the Consumer Credit Act 1974⁶. A contractual postponement of the right to redeem may be oppressive if the mortgagee is entitled to call for payment before the mortgagor can redeem⁷. A mortgage can validly secure a contingent liability even if the result is that the mortgagor cannot redeem for an indefinite period⁸.

1 Eg as in *Fairclough v Swan Brewery Co Ltd* [1912] AC 565, PC, where in a mortgage of a 20-year lease, redemption was postponed until six weeks before the expiry of the lease. See also *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA; but see the dictum in *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 53, HL, per Lord Parker of Waddington. On the same principle, a provision limiting the right to redeem to the lifetime of the mortgagor has been held invalid: see *Price v Perrie* (1702) Freem Ch 258; *Salt v Marquess of Northampton* [1892] AC 1, HL. Cf *Bonham v Newcomb* (1684) as reported in 1 Vern 232; affd (1689) 1 Vern 233n, HL (where a provision restricting redemption to the life of the mortgagor was upheld on the ground that it was proved that the mortgagor had intended to make a settlement of the mortgaged property on the mortgagee in case he should not think fit to redeem in his lifetime).

2 *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA; on appeal [1940] AC 613, [1940] 2 All ER 401, HL (where this question was not dealt with).

3 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL; *Re Petrol Filling Station, Vauxhall Bridge Road, London, Rosemex Service Station Ltd v Shell Mex and BP Ltd* (1968) 20 P & CR 1; *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513, [1972] 1 WLR 814; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA. As to restraint of trade see **COMPETITION** vol 18 (2009) PARA 377 et seq.

4 *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA; *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA.

5 See *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA, where postponement for 40 years was upheld.

6 See the Consumer Credit Act 1974 s 94; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 251.

7 *Morgan v Jeffreys* [1910] 1 Ch 620; *Davis v Symons* [1934] Ch 442; *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA.

8 *Re Rudd & Son Ltd* [1991] BCLC 378n, (1986) 2 BCC 98, 955, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(3) RESTRICTIONS ON RIGHT TO REDEEM/319. Collateral benefits.

319. Collateral benefits.

There is no objection to a stipulation that a mortgagee is to have a collateral advantage¹ provided that:

- 25 (1) it is not unfair and unconscionable²;
- 26 (2) it is not in the nature of a penalty clogging the equity of redemption³;
- 27 (3) it is not inconsistent with or repugnant to the right to redeem⁴; and
- 28 (4) it is not an unreasonable restraint of trade⁵.

So long as these requirements are met, there is no objection to a collateral benefit continuing after redemption, and no rule which permits the mortgagor to redeem merely on payment of principal, interest and costs regardless of the terms of the contract⁶. If a mortgagor wishes to object to a collateral benefit it seems that he must offer to repay the mortgage⁷.

Factors to be taken into account in determining whether a provision is unconscionable include the strength of bargaining position of the parties, whether the stronger party has taken advantage of his position, whether he has gained an unequal bargain, whether the weaker party has received independent advice, and the terms of the transaction itself⁸. The conscience of the stronger party must be affected⁹.

These rules apply not only to land but also to other forms of property such as shares or stocks¹⁰, insurance policies¹¹, floating charges¹², and mortgages made by commercial and other companies¹³. The rule forbids an indirect as much as a direct fetter on the property¹⁴. A tied contract which does not offend these principles will be upheld¹⁵.

Where an option to purchase is granted against the background of a sale of the property by the grantee of the option to the grantor at a price which is to be left outstanding, it is necessary to consider whether the transaction is one of sale and purchase or of mortgage¹⁶.

If the transaction is a mortgage, a contract to sell, if required, to the mortgagee part of the mortgaged property at a fixed price¹⁷, or an option contained in the mortgage deed to the mortgagee to purchase at a fixed price¹⁸, is invalid. Where the property mortgaged is leasehold and the lease contains an option to purchase the freehold reversion, it is doubtful whether the

mortgagee can stipulate to have the option transferred to him absolutely by way of collateral benefit¹⁹. Where the option is assigned to him by way of security only and he exercises it, the mortgagor on redemption is entitled to a conveyance of the reversion²⁰.

The following contracts have been held not to be enforceable after redemption: a contract to buy back from a brewer-mortgagee²¹; a contract to pay to the mortgagee a share of the profits of a hotel²²; a contract to employ the mortgagee as auctioneer²³ or broker²⁴; and a debenture with a right to the payment of a bonus out of profits after the principal has been paid off²⁵.

On a sale, where part of the purchase money remains on mortgage, a covenant for pre-emption is good if it is part of the sale and not part of the contract of mortgage²⁶, but, even in the case of a sale from the mortgagor to the mortgagee, redemption has been allowed on special grounds²⁷.

An option to call for shares in consideration of a loan may be upheld²⁸.

1 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 61, HL, per Lord Parker of Waddington; *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA; *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489 (approved in *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA); *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd's Rep (Bank) 323.

2 The test is not one of reasonableness: see *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; approved in *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA. An unconscionable provision is void, not voidable: see *Brighton and Hove City Council v Audus* [2009] EWHC 340 (Ch), [2009] 09 EG 192 (CS), [2009] All ER (D) 25 (Mar).

3 See PARA 317.

4 As to the right to redeem see PARAS 107, 317.

5 See PARA 318.

6 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL.

7 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 299, [1967] 1 All ER 699 at 708, HL, per Lord Reid; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] AC 561, [1975] 1 All ER 968, PC.

8 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 61, HL, per Lord Parker of Waddington; *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA; *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, [2000] Lloyd's Rep Bank 197, CA; *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd's Rep Bank 323.

9 *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA.

10 *Bradley v Carritt* [1903] AC 253, HL; *Samuel v Jarrah Timber and Wood Paving Corp* [1904] AC 323, HL.

11 *Salt v Marquess of Northampton* [1892] AC 1, HL.

12 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 41, 44, HL, per Lord Haldane LC. The application of the rule to floating charges was left open in *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52, HL. See also **COMPANIES** vol 15 (2009) PARA 1269 et seq.

13 *Samuel v Jarrah Timber and Wood Paving Corp* [1904] AC 323, HL.

14 *Bradley v Carritt* [1903] AC 253, HL.

15 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL; *Re Petrol Filling Station, Vauxhall Bridge Road, London, Rosemex Service Station Ltd v Shell Mex and BP Ltd* (1968) 20 P & CR 1; *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513, [1972] 1 WLR 814; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA.

- 16 *Warnborough Ltd v Garmite Ltd* [2003] EWCA Civ 1544, [2004] 1 P & CR D18, [2003] All ER (D) 52 (Nov); *Warnborough Ltd v Garmite Ltd* [2006] EWHC 10 (Ch), [2007] 1 P & CR 34, [2006] All ER (D) 22 (Jan). See also *Brighton and Hove City Council v Audus* [2009] EWHC 340 (Ch), [2009] 09 EG 192 (CS), [2009] All ER (D) 25 (Mar).
- 17 *Jennings v Ward* (1705) 2 Vern 520; *Re Edwards' Estate* (1861) 11 I Ch R 367.
- 18 *Samuel v Jarrah Timber and Wood Paving Corp* [1904] AC 323, HL. See also *Lewis v Frank Love Ltd* [1961] 1 All ER 446, [1961] 1 WLR 261.
- 19 *Nelson v Hannam* [1943] Ch 59 at 61-62, [1942] 2 All ER 680 at 684, CA, per Lord Greene MR.
- 20 *Nelson v Hannam* [1943] Ch 59, [1942] 2 All ER 680, CA. See also PARA 196.
- 21 *Noakes & Co Ltd v Rice* [1902] AC 24, HL.
- 22 *Santley v Wilde* [1899] 2 Ch 474, CA.
- 23 *Broad v Selfe* (1863) 11 WR 1036; *Browne v Ryan* [1901] 2 IR 653, CA.
- 24 *Bradley v Carritt* [1903] AC 253, HL.
- 25 *Re Rainbow Syndicate Ltd, Owen v Rainbow Syndicate Ltd* [1916] WN 178 at 179.
- 26 *Davies v Chamberlain* (1909) 26 TLR 138, CA; *Re Moore and Texaco Canada Ltd* [1965] 2 OR 253 (Can); *Re Petrol Filling Station, Vauxhall Bridge Road, London, Rosemex Service Station Ltd v Shell Mex and BP Ltd* (1968) 20 P & CR 1. Cf *Orby v Trigg* (1722) 9 Mod Rep 2, where a covenant in a mortgage deed allowing pre-emption was rejected, the mortgagee having concealed it. A mortgagee may not sell to himself in exercise of his power of sale in accordance with a valid option or right of pre-emption: see *Williams v Wellingborough Borough Council* [1975] 3 All ER 462, [1975] 1 WLR 1327, CA.
- 27 *Bowen v Edwards* (1661) 1 Rep Ch 117 at 221.
- 28 *London and Globe Finance Corp v Montgomery* (1902) 18 TLR 661.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(3) RESTRICTIONS ON RIGHT TO REDEEM/320. Subsequent and independent transactions.

320. Subsequent and independent transactions.

The rule against clogging the equity of redemption applies to a subsequent transaction which varies the terms on which the mortgagor is entitled to redeem¹ but does not invalidate subsequent and independent transactions between the mortgagor and mortgagee relating to the mortgaged property². Accordingly, the mortgagee may, subsequently to the mortgage, stipulate for an option of purchase of the property³, or for a sale⁴ or release⁵ to him of the equity of redemption. Such a sale or release is, however, liable to be set aside if there has been any oppression or unfairness on the part of the mortgagee⁶, the burden of proof of such oppression or unfairness being on the mortgagor⁷. Mere inadequacy of price is not, however, in itself ground for setting it aside⁸. Moreover, a contract contemporaneous with a mortgage, but wholly independent of it and forming no part of the consideration for the mortgage, is valid⁹.

As regards leases by a mortgagor to his mortgagee, a lease for a long period at an inadequate rent will not be upheld¹⁰, but an ordinary occupation lease at a fair rent is not objectionable¹¹.

1 *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd's Rep (Bank) 323.

2 As to the rule against clogging the equity of redemption see PARA 317.

3 *Reeve v Lisle* [1902] AC 461, HL; *Bonham v Newcomb* (1684) 1 Vern 232 (affd (1689) 1 Vern 233n, HL); *Kevans v Joyce* [1896] 1 IR 442. Cf *Lewis v Frank Love Ltd* [1961] 1 All ER 446, [1961] 1 WLR 261 (a case on the face of it of transfer of mortgage, but in reality more one of a new loan).

4 *Knight v Marjoribanks* (1849) 2 Mac & G 10 at 14.

5 *Melbourne Banking Corp v Brougham* (1882) 7 App Cas 307, PC; *Cotterell v Purchase* (1734) Cas temp Talb 61. See also *Rushbrook v Lawrence* (1869) 5 Ch App 3, where an agreement for a release was treated as abandoned, since for 12 years no step had been taken to complete the transaction.

6 *Webb v Rorke* (1806) 2 Sch & Lef 661; *Ford v Olden* (1867) LR 3 Eq 461; *Prees v Coke* (1871) 6 Ch App 645. See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 854 et seq.

7 *Melbourne Banking Corp v Brougham* (1882) 7 App Cas 307, PC. See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 854.

8 *Knight v Marjoribanks* (1849) 2 Mac & G 10 at 13; *Purdie v Millett* (1829) Taml 28. See also *Waters v Groom* (1844) 11 Cl & Fin 684 at 699, HL, per Lord Brougham.

9 *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52 at 67, HL; *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL; *Re Petrol Filling Station, Vauxhall Bridge Road, London, Rosemex Service Station Ltd v Shell Mex and BP Ltd* (1968) 20 P & CR 1. See also PARA 319.

10 *Webb v Rorke* (1806) 2 Sch & Lef 661; *Hickes v Cooke* (1816) 4 Dow 16 at 24-25, HL. See also *Gubbins v Creed* (1804) 2 Sch & Lef 214.

11 *Morony v O'Dea* (1809) 1 Ball & B 109.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(3) RESTRICTIONS ON RIGHT TO REDEEM/321. Bonus.

321. Bonus.

The validity of a provision in a mortgage for a bonus or premium or other such sum must be determined in the same way as any other collateral benefit¹. A contract for payment to the mortgagee of a bonus in addition to the sum advanced is not inherently objectionable². A valid bonus can be claimed by a mortgagee either in taking account of what is due on his mortgage or under the head of just allowances³. Examples of loans with a bonus are debentures issued at a discount and loans by building societies where a premium is charged⁴, but a provision in a debenture for payment of a bonus out of profits after the principal has been paid off is not enforceable⁵. A service charge is not inherently objectionable⁶.

1 See *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166, [1967] 2 All ER 639, where such a provision was held to be unconscionable. The older cases are influenced by the old usury laws: see *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 49-50, HL. See also *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489. As to bonuses see PARA 725.

2 *Potter v Edwards* (1857) 26 LJCh 468; *James v Kerr* (1889) 40 ChD 449; *Mainland v Upjohn* (1889) 41 ChD 126.

3 *Bucknell v Vickery* (1891) 64 LT 701, PC. See also PARA 725.

4 *Re Anglo-Danubian Steam Navigation and Colliery Co* (1875) LR 20 Eq 339; *Re Phillips, ex p Bath* (1884) 27 ChD 509, CA.

5 *Re Rainbow Syndicate Ltd, Owen v Rainbow Syndicate Ltd* [1916] WN 178 at 179.

6 *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(3) RESTRICTIONS ON RIGHT TO REDEEM/322. Costs.

322. Costs.

A solicitor mortgagee may charge his costs, or those of the firm of which he is a member, for all work done in completing and preparing a mortgage against the security¹. Consequently no such mortgage can be redeemed except upon payment of such charges and remuneration².

1 See the Solicitors Act 1974 s 58; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 941.

2 See PARA 324.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(3) RESTRICTIONS ON RIGHT TO REDEEM/323. Mortgages temporarily unredeemable.

323. Mortgages temporarily unredeemable.

Although in general no contract between a mortgagee and mortgagor can make a mortgage irredeemable¹, the circumstances of the case may make redemption for a time impossible, as for example when a mortgage is made to secure an annuity, or as an indemnity against future liabilities, or for any other object not capable of immediate pecuniary valuation².

1 See PARA 317.

2 *Fleming v Self* (1854) 3 De GM & G 997.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(4) TERMS AND INCIDENTS OF REDEMPTION/324. Terms of redemption.

(4) TERMS AND INCIDENTS OF REDEMPTION

324. Terms of redemption.

The terms on which a mortgagor or those claiming under him are entitled to redeem are the same, whether they are ascertained in a claim for redemption or for foreclosure¹. These terms are: payment to the mortgagee of the principal debt, interest on that debt, all proper costs, charges and expenses incurred by the mortgagee in relation to the mortgage debt or the mortgage security, the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the mortgage security, and the mortgagee's costs of the redemption claim². However small may be the interest in the mortgaged property of the person seeking redemption, he must pay to the mortgagee all that is due³.

1 *Sober v Kemp* (1847) 6 Hare 155. As to proceedings for redemption see PARA 656 et seq; and as to foreclosure see PARA 566 et seq. As to the right of a mortgagee to recover arrears of interest see **LIMITATION PERIODS** vol 68 (2008) PARA 1105 et seq.

2 *Re Wallis, ex p Lickorish* (1890) 25 QBD 176, CA. See also PARA 751 et seq. See further *Gardner v Wainfur* (1919) 89 LJCh 98 (advances made during minority for necessities and acknowledged after majority must be paid in full on redemption). As to the special rights of a mortgagee under the doctrine of consolidation see PARA 498 et seq. As to the costs of reconveyance see PARA 654.

3 *Palk v Lord Clinton* (1805) 12 Ves 48 at 59; *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 134; *Wilson v Cluer* (1840) 3 Beav 136. Cf *Kinnaird v Trollope* (1889) 42 ChD 610.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(4) TERMS AND INCIDENTS OF REDEMPTION/325. Incidents of redemption.

325. Incidents of redemption.

A mortgagor of personalty, for example securities, may redeem at any time before the actual sale¹. On redemption the mortgagee must return the identical securities pledged, if capable of identification or, if he has sold them during the currency of the loan, must account to the mortgagor for the proceeds of such sale². The right to a return of the identical securities may be lost by the course of dealing between the mortgagor and the mortgagee, or by acquiescence by the mortgagor, and in these cases the mortgagor's right is a right to have returned to him a corresponding quantity of shares of the same denomination³.

If, before the right to redeem is lost, the mortgagee by wrongfully parting with the securities has put it out of his power to return the identical securities, he cannot sue for the debt, and his trustee in bankruptcy has no greater right⁴.

1 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA. As to mortgages of personalty see PARA 231 et seq.

2 *Langton v Waite* (1868) LR 6 Eq 165, following *Ex p Dennison* (1797) 3 Ves 552.

3 *Crerar v Bank of Scotland* 1921 SC 736, Ct of Sess.

4 *Ellis & Co's Trustee v Dixon-Johnson* [1925] AC 489, HL.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(5) DISPOSAL OR DEVOLUTION OF EQUITY OF REDEMPTION/326. General power of disposition inter vivos.

(5) DISPOSAL OR DEVOLUTION OF EQUITY OF REDEMPTION

326. General power of disposition inter vivos.

In as much as the mortgagor after the mortgage is created retains an estate or interest in the mortgaged property¹, he can sell, mortgage or otherwise dispose² of it during his life, or dispose of it by will³. A mortgagor beneficially entitled to possession of property for a long term of years capable of enlargement can enlarge the term into a fee simple notwithstanding the incumbrances on the term which upon enlargement will affect the fee simple so created⁴.

1 Where a legal mortgage or charge of freehold or leasehold property is created, the mortgagor's estate is a legal one: see PARA 190 et seq. As to the powers of a proprietor of registered land see the Land Registration Act 2002 s 26; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 909.

2 See *Pawlett v A-G* (1667) Hard 465; *Casborne v Scarfe* (1738) 1 Atk 603; *Heath v Pugh* (1881) 6 QBD 345 at 360, CA (affd sub nom *Pugh v Heath* (1882) 7 App Cas 235, HL); *Jennings v Jordan* (1881) 6 App Cas 698, HL; *Tarn v Turner* (1888) 39 ChD 456 (affd (1888) 39 ChD 456, CA); *Copestake v Hoper* [1908] 2 Ch 10, CA.

3 See **WILLS** vol 50 (2005 Reissue) PARA 327 et seq. This power of disposition is usually qualified by a provision in the mortgage requiring the consent of the lender to any disposition. In that case, failure to obtain consent prior to a disposition would be a breach of the terms of the mortgage. Prior consent is also required for the sale of a house purchased with an advance under the Small Dwellings Acquisition Acts 1899 to 1923: see the Housing Act 1985 s 456, Sch 18 (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 39; Insolvency Act 1986 s 439(2), Sch 14; Arbitration Act 1996 s 107(2), Sch 4).

4 See the Law of Property Act 1925 s 153; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 108 et seq. As to the mortgage extending to accretions see PARA 196.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(5) DISPOSAL OR DEVOLUTION OF EQUITY OF REDEMPTION/327. Devolution on death.

327. Devolution on death.

On the death of the mortgagor intestate the equity of redemption in his mortgaged property devolves on his personal representatives in the same manner as his other estate¹.

1 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 353 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(6) RIGHT OF REDEMPTION IN RELATION TO CHARGING ORDERS/328. Discharge of charging orders.

(6) RIGHT OF REDEMPTION IN RELATION TO CHARGING ORDERS

328. Discharge of charging orders.

A charge imposed by a charging order has the like effect as an equitable charge¹. The court by which a charging order is made may at any time, on the application of the debtor or any person interested in any property to which the order relates, make an order discharging or varying the charging order². The court may discharge a charging order on the ground that it should not have been made absolute³, on the ground that the judgment debt is satisfied⁴, or on the ground that the creditor proved in the debtor's bankruptcy and failed to evince an intention to realise his security⁵. The debtor cannot obtain a discharge of the charging order merely by paying the judgment debt but must also pay interest and costs as if he were seeking to redeem an equitable charge⁶. The Limitation Act 1980⁷ does not apply to the enforcement of a charging order⁸.

1 See the Charging Orders Act 1979 s 3(4); and PARA 242; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1480.

2 See the Charging Orders Act 1979 s 3(5); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1484.

3 *Howell v Montey* (1990) 61 P & CR 18, CA.

4 See CPR 73.9; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1485.

5 See *C & W Berry Ltd v Armstrong-Moakes* [2007] EWHC 2101 (QB), [2008] 1 P & CR D2, [2007] All ER (D) 82 (Sep).

6 *Ezekiel v Orakpo* [1997] 1 WLR 340, CA.

7 See the Limitation Act 1980 s 20(5): see **LIMITATION PERIODS** vol 68 (2008) PARA 1111.

8 *Ezekiel v Orakpo* [1997] 1 WLR 340, CA; *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156, [2009] 2 All ER (Comm) 164, [2009] 1 P & CR 345.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(7) ENFORCEMENT OF THE EQUITY OF REDEMPTION/329. When right enforceable.

(7) ENFORCEMENT OF THE EQUITY OF REDEMPTION

329. When right enforceable.

A mortgagor is not entitled to redeem the mortgaged property before the day fixed in the mortgage contract for payment of the principal¹, unless the mortgagee has taken steps to recover payment by taking possession of the property or otherwise². On that day the mortgagor has a legal right, on payment of what is due, to recover the mortgaged property³. After that day has passed and default has been made, he has an equitable right to redeem the property⁴.

1 *Brown v Cole* (1845) 14 Sim 427. See also *Harding v Tinge* (1864) 34 LJCh 13.

2 *Bovill v Endle* [1896] 1 Ch 648; *Ex p Wickens* [1898] 1 QB 543 at 548, CA. As to the postponement of the right to redeem see PARA 318. As to early repayment of regulated agreements under the Consumer Credit Act 1974 see s 94; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 251 et seq.

3 *Crickmore v Freeston* (1870) 40 LJCh 137; *Cummins v Fletcher* (1880) 14 ChD 699, CA. As to the nature of the mortgagor's rights until the time for payment has arrived see **EQUITY** vol 16(2) (Reissue) PARA 605.

4 See PARA 107.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(7) ENFORCEMENT OF THE EQUITY OF REDEMPTION/330. Notice to pay off mortgage.

330. Notice to pay off mortgage.

It was a settled rule of practice that after default has been made by a mortgagor in payment of the principal and interest in accordance with the proviso for redemption, he had either to give the mortgagee six months' notice of his intention to pay off the mortgage, or to pay him six months' interest in lieu of notice¹; and if the mortgagor, after giving notice of his intention to pay off the mortgage, made default in so doing, and the default was not explained, the mortgagee was entitled to further reasonable notice but not a fresh six months' notice or six months' interest in lieu of notice². Mere delay in drawing up an order directing payment out of a fund in court to a mortgagee was not a ground for demanding a further notice or interest in lieu of notice³; and if the default was explained it was sufficient that reasonable notice was given⁴. Neither the nature of the mortgaged property⁵, nor the fact that the property had been realised otherwise than by the act of the mortgagee⁶, gave rise to any exception from these rules.

However, this practice arose on the basis that a mortgagor who sought an equitable remedy was required to do equity by allowing the mortgagee a reasonable opportunity to find a new investment for his money⁷. The practice has been described as harsh⁸ and may be reconsidered in the light of present circumstances where alternative investments are readily available⁹. Most modern mortgages make express provision for the length of notice required to redeem¹⁰.

A mortgagor who has the contractual right to redeem on payment on demand also has an equitable right to redeem without a demand¹¹.

1 *Smith v Smith* [1891] 3 Ch 550 at 553 per Romer J; *Browne v Lockhart* (1840) 10 Sim 420 at 424; *Johnson v Evans* (1889) 61 LT 18, CA; *Garforth v Bradley* (1755) 2 Ves Sen 675 at 678; 2 Cases with Opinions of Counsel 51; *Cromwell Property Investment Co Ltd v Western and Toovey* [1934] Ch 322.

2 *Cromwell Property Investment Co Ltd v Western and Toovey* [1934] Ch 322.

3 *Sharpnell v Blake* (1737) 2 Eq Cas Abr 603. See also *Harmer v Priestley* (1853) 16 Beav 569.

4 *Cromwell Property Investment Co Ltd v Western and Toovey* [1934] Ch 322, where under the circumstances three months' notice was reasonable.

5 *Smith v Smith* [1891] 3 Ch 550.

6 *Spencer-Bell to London and South Western Rly Co and Metropolitan District Rly Co* (1885) 33 WR 771, where the mortgaged property was acquired by a railway company compulsorily.

7 As to the maxim he who seeks equity must do equity see **EQUITY** vol 16(2) (Reissue) PARAS 558-559.

8 *Cromwell Property Investment Co Ltd v Western and Toovey* [1934] Ch 322 at 332 per Maughan J.

9 Compare the change in the practice of requiring a tenant to pay indemnity costs as a condition of relief from forfeiture: see *Billson v Residential Apartments* [1992] 1 AC 494, [1992] 1 All ER 141, HL. An express term which requires payment of six months' interest in lieu of notice may be regarded as unfair if it requires a consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation: see the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 para 1(e); and **CONTRACT** vol 9(1) (Reissue) PARA 794. As to the meaning of 'consumer' in this context see PARA 229 note 1.

10 See PARAS 221-222.

11 See *Re Rudd & Son Ltd* [1991] BCLC 378n, (1986) 2 BCC 98, 955, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(7) ENFORCEMENT OF THE EQUITY OF REDEMPTION/331. Effect of steps taken by mortgagee.

331. Effect of steps taken by mortgagee.

If the mortgagee himself demands payment or takes steps to realise his security, whether the time fixed by the mortgage deed for redemption has arrived or not¹, or consents to a sale of the mortgaged property in administration proceedings² or to payment of his debt out of a fund in court³, he is not entitled to the usual six months' notice or interest even though, after he has taken proceedings to recover his debt, the mortgagor has given him notice of intention to pay in six months⁴. The following are steps taken to realise the security: going into possession of mortgaged property⁵ or selling it⁶; bringing a claim for foreclosure⁷ or to administer the mortgagor's estate⁸; and giving notice to pay off in such a form as to enable the mortgagee to exercise his statutory power of sale⁹. A mortgagee who has demanded payment cannot refuse a tender of principal and interest to date of payment, even though the time limited in the mortgagee's demand has been exceeded¹⁰. Where, however, a day for redemption has been

fixed by a foreclosure order, the mortgagor, if he wishes to redeem before that day, must pay interest up to the day appointed¹¹.

The mortgagee is not entitled to notice, or interest in lieu of notice, if his loan is merely of a temporary character, as, for instance, in the case of an equitable mortgage by deposit of title deeds¹². So also, where the debt is repayable on demand, the mortgagor may redeem at any time and this is apparently so even where the mortgagee has covenanted not to call the mortgage in until a specified date¹³.

1 *Bovill v Endle* [1896] 1 Ch 648.

2 *Day v Day* (1862) 31 Beav 270; *Re Fowler, Bishop v Fowler* (1922) 128 LT 620. See also *Matson v Swift* (1841) 5 Jur 645.

3 *Re Moss, Levy v Sewill* (1885) 31 ChD 90.

4 *Re Alcock, Prescott v Phipps* (1883) 23 ChD 372, CA. See also PARA 330.

5 *Bovill v Endle* [1896] 1 Ch 648. See also PARA 402 et seq.

6 *Banner v Berridge* (1881) 18 ChD 254. See also PARA 440 et seq.

7 *Hill v Rowlands* [1897] 2 Ch 361 at 363, CA. See also PARA 566 et seq.

8 *Re Alcock, Prescott v Phipps* (1883) 23 ChD 372, CA.

9 *Edmondson v Copland* [1911] 2 Ch 301 at 306. As to the rules affecting redemption under bills of sale see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1796.

10 *Edmondson v Copland* [1911] 2 Ch 301.

11 *Hill v Rowlands* [1897] 2 Ch 361, CA. As to foreclosure orders see PARA 592 et seq.

12 *Fitzgerald's Trustee v Mellersh* [1892] 1 Ch 385. As to equitable mortgages by deposit of title deeds see PARA 119 et seq.

13 See *GA Investments Pty Ltd v Standard Insurance Co Ltd* [1964] WAR 264, W Aust FC (where it was held that the only notice required was for such period as would enable the mortgagee to receive the money and bank it).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(7) ENFORCEMENT OF THE EQUITY OF REDEMPTION/332. Necessity for tender of amount due.

332. Necessity for tender of amount due.

The mortgagor is entitled to know how much he is liable to pay and how that amount is arrived at¹. A mortgagor who desires to discharge the mortgage debt must tender to the mortgagee the full amount that is due in legal currency² and produce it before the mortgagee unless he waives the production³, or refuses to accept money then available for immediate payment⁴. Where a mortgagee has unequivocally refused a proposed tender, a formal tender is not necessary, at any rate where the mortgagor has the money or the control of it⁵. The tender must be unconditional, but may be under protest⁶.

Unless a place for payment is named in the mortgage deed, the tender must be made to the mortgagee or to some person entitled on his behalf to receive all that is due under the mortgage⁷. Where a debenture does not provide as to the place of payment, the company must seek out the debenture holder in order to pay him⁸. Where more than one person is entitled to

the money, a tender is good which, after full notice to all parties, is made at the office of one of them who is a solicitor⁹.

A stranger cannot make a valid tender; it must be made by or on behalf of a person having a prima facie right to redeem¹⁰.

1 *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166 at 172-173, [1967] 2 All ER 639 at 641-642 per Goff J. The mortgagee is obliged only to produce an honest redemption statement, not an accurate one: *Equatorial Corp v Shah* [1996] NPC 172. As to the rights of a debtor under a regulated agreement under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 236 et seq.

2 *Rhodes v Buckland* (1852) 16 Beav 212. As to tender generally see **CONTRACT** vol 9(1) (Reissue) PARA 975. A loan in foreign currency may be redeemed in that currency: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438, HL.

3 *Douglas v Patrick* (1790) 3 Term Rep 683; *Powney v Blomberg* (1844) 8 Jur 746 (a letter saying 'DD now tenders', without enclosing any money, was not a good tender, although the mortgagee's solicitor wrote back, 'I decline your tender'); *Blumberg v Life Interests etc Corp* [1897] 1 Ch 171 (an unsuccessful attempt to establish a tender by cheque to the mortgagee's agent); *Re Farley, ex p Danks* (1852) 2 De GM & G 936.

4 *Robarts v Jefferys* (1830) 8 LJOS Ch 137. As to the effect of refusal of tender see PARA 333.

5 *Chalikani Venkatarayanim v Tuni (Zamindar)* (1922) LR 50 Ind App 41.

6 *Thorpe v Burgess* (1840) 8 Dowl 603; *Manning v Lunn* (1845) 2 Car & Kir 13; *Scott v Uxbridge and Rickmansworth Rly Co* (1866) LR 1 CP 596; *Sweny v Smith* (1869) LR 7 Eq 324; *Greenwood v Sutcliffe* [1892] 1 Ch 1, CA.

7 Co Litt 210a, 210b.

8 *Fowler v Midland Electric Corp for Power Distribution Ltd* [1917] 1 Ch 656, CA.

9 *Cliff v Wadsworth* (1843) 2 Y & C Ch Cas 598. See also PARA 639.

10 *Pearce v Morris* (1869) 5 Ch App 227.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(7) ENFORCEMENT OF THE EQUITY OF REDEMPTION/333. Effect of refusal of tender.

333. Effect of refusal of tender.

A mortgagee may lose his right to receive costs or be ordered to pay the costs if, by refusal of a proper tender, he renders necessary a claim for redemption¹, or after a sufficient tender begins a foreclosure claim². Refusal of a proper tender is not equivalent to payment, but if the money, after the refusal, has been paid into court, or kept ready for immediate payment to the mortgagee, no further interest is payable³. For the purpose of stopping interest running, the tender need not be such a tender as would afford a defence at law⁴. If the amount tendered was all that was due, the mortgagee must bear the costs of a subsequent suit for redemption⁵. If it is intended that on receipt of the money the mortgagee should execute a reconveyance or discharge, a draft of the proposed instrument should be sent to him at a reasonable time before the tender⁶. Money extorted by a mortgagee in excess of what is due can be recovered by the mortgagor as money had and received⁷. The duty of the mortgagee on payment of all that is due is to produce and hand over the title deeds and the duly executed reconveyance, and the refusal to do this, when a sufficient tender has been made, amounts to a refusal of the tender⁸. The duty to execute a reconveyance may be performed by the mortgagee indorsing a statutory receipt on the mortgage before handing it over⁹.

- 1 *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273, PC; *Graham v Seal* (1918) 88 LJCh 31, CA. As to tender see PARA 332. As to proceedings for redemption see PARA 656 et seq.
- 2 *Smith v Green* (1844) 1 Coll 555. As to foreclosure see PARA 566 et seq.
- 3 *Gyles v Hall* (1726) 2 P Wms 378; *Bishop v Church* (1751) 2 Ves Sen 371; *Garforth v Bradley* (1755) 2 Ves Sen 675; *Hodges v Croydon Canal Co* (1840) 3 Beav 86; *Kinnaird v Trollope* (1889) 42 ChD 610; *Barratt v Gough-Thomas* [1951] 2 All ER 48.
- 4 *Manning v Burges* (1663) 1 Cas in Ch 29; *Webb v Crosse* [1912] 1 Ch 323 at 328. As to interest ceasing to run after tender see also PARA 734.
- 5 *Harmer v Priestley* (1853) 16 Beav 569.
- 6 *Wiltshire v Smith* (1744) 3 Atk 89; *Rourke v Robinson* [1911] 1 Ch 480; *Webb v Crosse* [1912] 1 Ch 323 at 329. See further PARA 643.
- 7 *Close v Phipps* (1844) 7 Man & G 586; *Fraser v Pendlebury* (1861) 10 WR 104. See further **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 5, 65 et seq. In appropriate cases money may be recoverable as having been paid under a mistake of fact or law: see **MISTAKE** vol 77 (2010) PARA 69 et seq; **RESTITUTION** vol 40(1) (2007 Reissue) PARA 28 et seq. As to the binding effect of statements given under the Consumer Credit Act 1974 see s 172; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 202 et seq.
- 8 *Rourke v Robinson* [1911] 1 Ch 480; *Walker v Jones* (1866) LR 1 PC 50 at 61.
- 9 See the Law of Property Act 1925 s 115; and PARA 645.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(8) LOSS OF RIGHT TO REDEEM/334. Loss by sale of equity of redemption.

(8) LOSS OF RIGHT TO REDEEM

334. Loss by sale of equity of redemption.

The right of redemption is lost on a sale or release of the equity of redemption by the mortgagor to the mortgagee made by a separate transaction subsequent to the mortgage and entirely independent of any bargain contemporaneous with it¹, or by a valid sale of the property by process of the court² or by the mortgagee under his power of sale³. The equity of redemption is extinguished by a contract for sale⁴.

- 1 See PARAS 107, 320.
- 2 See PARA 616 et seq.
- 3 See PARA 440 et seq.
- 4 See *National and Provincial Building Society v Ahmed* [1995] NPC 88, [1995] 2 EGLR 127, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/5. THE EQUITY OF REDEMPTION/(8) LOSS OF RIGHT TO REDEEM/335. Loss by lapse of time or foreclosure.

335. Loss by lapse of time or foreclosure.

The right of redemption may be lost by lapse of time in the case of a mortgage of land¹, or by the operation of an order for foreclosure².

1 See the Limitation Act 1980 s 16; Land Registration Act 2002 s 96(2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1129.

2 See PARA 607; and see also **LIMITATION PERIODS** vol 68 (2008) PARA 1124 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(1) IN GENERAL/336. Rights of mortgagor to redeem, to inspect title deeds and to have accounts.

6. RIGHTS AND LIABILITIES OF THE MORTGAGOR

(1) IN GENERAL

336. Rights of mortgagor to redeem, to inspect title deeds and to have accounts.

The right of a mortgagor to redeem the mortgaged property¹, to inspect title deeds which are in the mortgagee's possession², and to the taking of accounts between himself and the mortgagee³ are considered elsewhere in this title.

1 See PARAS 107, 302 et seq.

2 See PARAS 491-494.

3 See PARA 705 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(1) IN GENERAL/337. Liability of mortgagor to pay principal and interest.

337. Liability of mortgagor to pay principal and interest.

The forms of covenant normally included in mortgages for the purpose of providing for the repayment by the mortgagor of the principal money advanced and interest on it, and the effect of such covenants, are considered elsewhere in this title¹.

1 See PARA 208 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(2) RIGHT TO POSSESSION AND RECEIPT OF RENTS AND PROFITS/338. Right to possession until demand made.

(2) RIGHT TO POSSESSION AND RECEIPT OF RENTS AND PROFITS

338. Right to possession until demand made.

When a legal mortgage¹ is executed, the mortgagee has, or is in the same position as if he had, the mortgaged property in possession; and in the absence of express stipulation to the contrary he is entitled to immediate possession or receipt of the rents and profits². However, until the mortgagee demands possession³, or enters into receipt of the rents and profits of the mortgaged property, it is in accordance with the nature of the transaction that the mortgagor should remain in possession as owner of the legal estate⁴, and that possession is rightful⁵. Where a mortgagor⁶ is for the time being entitled to the possession or receipt of the rents⁷ and profits of any land as to which the mortgagee has not given notice of his intention to take possession or enter into receipt of the rents and profits, the mortgagor may sue for possession or for the recovery of the rents and profits or to prevent or recover damages for trespass or other wrong in relation to the mortgaged property⁸, and may rightfully retain possession against the mortgagee's receiver until demand for possession is made, unless the order appointing the receiver directs the mortgagor to obtain or deliver up possession⁹.

1 As to the creation of legal mortgages see PARA 187 et seq. As to how far an equitable mortgagee is entitled to possession see PARA 403.

2 See PARA 402 et seq. See also the text to notes 3-9.

3 *Bagnall v Villar* (1879) 12 ChD 812.

4 *Ashe v National Westminster Bank plc* [2008] EWCA Civ 55, [2008] 1 WLR 710, [2008] 2 P & CR 183.

5 *Heath v Pugh* (1881) 6 QBD 345 at 359, CA, per Lord Selborne LC; affd sub nom *Pugh v Heath* (1882) 7 App Cas 238, HL.

6 As to the meaning of 'mortgagor' see PARA 104 note 1.

7 'Rent' includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved or issuing out of or charged upon land, but does not include mortgage interest; 'rentcharge' includes a fee farm rent; 'fine' includes a premium or foregift and any payment, consideration, or benefit in the nature of a fine, premium or foregift: Law of Property Act 1925 s 205(1)(xxiii).

8 Law of Property Act 1925 s 98(1). The mortgagor may sue in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person: see s 98(1). This provision does not prejudice the power of a mortgagor to take proceedings independently in his own name only, either by virtue of any legal estate vested in him or otherwise: see s 98(2). Section 98 applies whenever the mortgage was made: see s 98(3). As to the power of a mortgagor apart from statute see PARA 360. See also PARA 339.

9 *Randfield v Randfield* (1859) 7 WR 651; *Yorkshire Banking Co v Mullan* (1887) 35 ChD 125.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(2) RIGHT TO POSSESSION AND RECEIPT OF RENTS AND PROFITS/339. Mortgagor in possession.

339. Mortgagor in possession.

So long as the mortgagee allows the mortgagor to remain in possession, that is so long as the mortgagee does not give notice to the lessee to pay the rent to him, the mortgagor continues to be entitled to receive the rent, and he is also entitled to enforce and take advantage of the lessee's covenants¹, and, in the absence of any special agreement, damages recovered belong to the mortgagor². Therefore, as the mortgagor, while he remains in possession, is entitled to the income of the land leased, he can enforce the covenants either by bringing proceedings or by re-entry³.

A tenancy at will is determined by a mortgage of which the tenant has notice, but the creation of a new tenancy may be inferred from the circumstances⁴.

The validity of a payment of rent by a tenant before he is given notice of a conveyance of the reversion by the grantee under that conveyance is not prejudiced by the conveyance of the reversion being valid without the tenant's having attorned to the grantee⁵. Although rent paid before it is due is not within this protection⁶, the mortgagee, as purchaser, is affected by constructive notice of the tenant's rights and is bound by any settlement made, previous to the mortgage, between mortgagor and lessee, by way of satisfaction of claims for all rent received during the term⁷. Conversely, a bona fide purchaser for value without notice is not affected by constructive notice of a tenant's right to rectification of the tenancy agreement⁸.

1 *Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd* [1989] 1 All ER 1161, [1989] 1 WLR 800, CA. In relation to tenancies granted prior to 1 January 1996, see also the Law of Property Act 1925 s 141(2) (which does not expressly refer to conditions of re-entry); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 567. However, s 141(3) (see PARA 423) shows that the condition of re-entry is regarded as a means of enforcing the lessee's covenants. In relation to tenancies granted on or after 1 January 1996, see the Landlord and Tenant (Covenants) Act 1995 s 3, s 15(1); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 580, 592. See further PARA 423.

2 *Turner v Walsh* [1909] 2 KB 484, CA. As to re-entry for breach of covenant see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 603 et seq.

3 See note 2. In relation to tenancies granted on or after 1 January 1996, a mortgagee in possession can enforce any tenant covenant of a tenancy or any right of re-entry enforceable by the mortgagor: see the Landlord and Tenant (Covenants) Act 1995 s 15(1); PARA 423; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 592.

4 *Jarman v Hale* [1899] 1 QB 994.

5 See the Law of Property Act 1925 s 151(1)(i); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 552.

6 *De Nicholls v Saunders* (1870) LR 5 CP 589; *Cook v Guerra* (1872) LR 7 CP 132.

7 *Green v Rheinberg* (1911) 104 LT 149, CA. See also *Hunt v Luck* [1901] 1 Ch 45 (affd [1902] 1 Ch 428, CA); *Barnhart v Greenshields* (1853) 9 Moo PCC 18 at 23. See further **EQUITY** vol 16(2) (Reissue) PARAS 581-582.

8 *Nurdin & Peacock v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249. See also *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089, referring to *Barnhart v Greenshields* (1853) 9 Moo PCC 18.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(2) RIGHT TO POSSESSION AND RECEIPT OF RENTS AND PROFITS/340. Right to receipt of rents.

340. Right to receipt of rents.

Prior to demand for possession, no occupation rent may be charged against the mortgagor for that part of the mortgaged land which is in his occupation, nor may the mortgagee claim back rents¹ or profits² accrued due and received before his demand for possession. Back rents received by a sequestrator³ are in the custody of the law, and can be recovered from him by a mortgagee⁴. A receiver appointed by the mortgagee is entitled to receive the rents as agent of the mortgagor but is not entitled to the rent as against a superior landlord who has served a distraint notice⁵. Rents received by a receiver appointed by another do not belong to a mortgagee⁶, and the mortgagee's remedy is to move to discharge the receiver and enter into possession⁷. Where a mortgage fund was misappropriated, and the mortgagor recovered capital and arrears of income, the mortgagee was held to have no claim to the arrears⁸. The mortgagor receives the profits for his own use and not as agent or trustee for the mortgagee, even though the mortgaged property is a life interest or other wasting security⁹.

While rightfully in possession, the mortgagor, so far as is consistent with the mortgagee's rights¹⁰, may cut and sell the crops and underwood¹¹ in the ordinary course of management¹², remove tenants' fixtures¹³, and hold the title deeds against everyone except the mortgagee¹⁴.

1 *Jolly v Arbuthnot* (1859) 4 De G & J 224; *Yorkshire Banking Co v Mullan* (1887) 35 ChD 125. See also *Green v Rheinberg* (1911) 104 LT 149, CA (rent paid to mortgagor in advance).

2 *Higgins v York Buildings Co* (1740) 2 Atk 107; *Ex p Wilson* (1813) 2 Ves & B 252; *Hele v Lord Bexley*, *Whitfield v Bowyer*, *Whitfield v Knight* (1855) 20 Beav 127.

3 As to sequestration see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1249, 1269, 1380-1385.

4 *Hamblyn v Ley* (1743) 3 Swan 301n; *Walker v Bell* (1816) 2 Madd 21; *Tatham v Parker* (1855) 1 Sm & G 506; *Re Hoare*, *Hoare v Owen* [1892] 3 Ch 94 at 98.

5 le a superior landlord who has served notice under the Law of Distress Amendment Act 1908 s 6: see **DISTRESS** vol 13 (2007 Reissue) PARA 960. As from a day to be appointed s 6 is repealed by the Tribunals, Courts and Enforcement Act 2007 ss 86, 146, Sch 14 para 20, Sch 23 Pt 4. At the date at which this volume states the law no such day had been appointed. See *Rhodes v Allied Dunbar Pension Services Ltd*, *Re Offshore Ventilation Ltd* [1989] 1 All ER 1161, [1989] 1 WLR 800, CA.

6 See PARA 421. As to the appointment of a receiver out of court see PARA 475 et seq; and as to the appointment of a receiver by the court see PARA 560 et seq.

7 *Thomas v Brigstocke* (1827) 4 Russ 64; *Re Hoare*, *Hoare v Owen* [1892] 3 Ch 94. As to the right of a mortgagee to enter into possession where the appointment of the receiver has been made subject to a provision preserving his rights see PARA 409. As to the right of a prior incumbrancer to obtain the discharge of a receiver appointed in his absence see PARA 564. As to the appointment of a receiver by a mortgagee already in possession see PARA 416.

8 *Life Association of Scotland v Siddal* (1861) 3 De GF & J 271.

9 *Colman v Duke of St Albans* (1796) 3 Ves 25; *Trent v Hunt* (1853) 9 Exch 14; *Jolly v Arbuthnot* (1859) 4 De G & J 224 at 236; *Markwick v Hardingham* (1880) 15 ChD 339 at 349, CA. See also *Re Marquis of Anglesey's Estate*, *Paget v Anglesey* (1874) LR 17 Eq 283, where a mortgagee of a life estate who had not entered into possession unsuccessfully claimed an apportioned part of the rents accruing due after the mortgagor's death by virtue of the Apportionment Act 1834.

10 As to the mortgagee's right to possession see PARA 402 et seq.

11 The felling of trees may be subject to restrictions, and a licence may be required: see **FORESTRY** vol 52 (2009) PARA 120 et seq. As to the preservation of trees and tree preservation orders see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 847 et seq.

12 *Hampton v Hodges* (1803) 8 Ves 105 (underwood); *Bagnall v Villar* (1879) 12 ChD 812 (crops); *Re Phillips, ex p National Mercantile Bank* (1880) 16 ChD 104, CA. As to timber see *Hippesley v Spencer* (1820) 5 Madd 422; *Humphreys v Harrison* (1820) 1 Jac & W 581; *King v Smith* (1843) 2 Hare 239 at 243; *Kekewich v Marker* (1851) 3 Mac & G 311 at 329; *Re Phillips, ex p National Mercantile Bank* at 106; *Harper v Aplin* (1886) 54 LT 383.

13 *Gough v Wood & Co* [1894] 1 QB 713, CA; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 at 282, 286, CA; *Ellis v Glover and Hobson Ltd* [1908] 1 KB 388, CA. As to fixtures see PARA 195.

14 *Davies v Vernon* (1844) 6 QB 443; *Newton v Beck* (1858) 3 H & N 220. As to the right of the mortgagee to the title deeds see PARA 485.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(3) STATUS OF THE MORTGAGOR IN POSSESSION/341. Position of mortgagor.

(3) STATUS OF THE MORTGAGOR IN POSSESSION

341. Position of mortgagor.

The continued possession of the mortgaged property by the mortgagor by permission of the mortgagee, without express provision¹, is referable to the mortgagor's interest in the property not to implied permission². The mortgagor has a status similar to that of a tenant, but his tenancy differs in some material respects from any other tenancy³. He does not have the rights of a tenant at will⁴, and he may be turned out of possession without notice⁵. The mortgagee may treat the mortgagor, as against a stranger, as his tenant at will, and as reversioner bring proceedings for trespass against a third person⁶, but the mortgagee is not bound to recognise such a tenancy and may bring proceedings against the mortgagor as a trespasser without a previous demand of possession⁷.

1 As to cases of express provisions as to tenancies see *Doe d Bastow v Cox* (1847) 11 QB 122 (mortgagor tenant at will and pleasure of mortgagee at yearly rent); *Walker v Giles* (1848) 6 CB 662 (mortgagors to retain possession until default, with proviso they should be tenants at will at a rent); *Doe d Dixie v Davies* (1851) 7 Exch 89 (covenant for quiet enjoyment by mortgagor as tenant at will at yearly rent).

2 See *Ashe v National Westminster Bank plc* [2008] EWCA Civ 55, [2008] 1 WLR 710, [2008] 2 P & CR 183.

3 See *Rhodes v Allied Dunbar Pension Services Ltd* [1989] 1 All ER 1161, [1989] 1 WLR 800, CA.

4 As to the nature of a tenancy at will see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 198 et seq.

5 *Moss v Gallimore* (1779) 1 Doug KB 279 at 285 per Lord Mansfield; *Christophers v Sparke* (1820) 2 Jac & W 223; *Partridge v Bere* (1822) 5 B & Ald 604; *Hitchman v Walton* (1838) 4 M & W 409; *Re Knight, ex p Isherwood* (1882) 22 ChD 384 at 392, CA, per Jessel MR.

6 *Partridge v Bere* (1822) 5 B & Ald 604.

7 *Doe d Roby v Maisey* (1828) 8 B & C 767 at 768; *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307 at 314.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(3) STATUS OF THE MORTGAGOR IN POSSESSION/342. Express agreement.

342. Express agreement.

The mortgagor may be expressly made a tenant of a mortgagee, and an express provision in the mortgage deed that the mortgagor may remain in possession until some certain event may create an interest in the nature of a term of years¹. A demise is implied by a covenant that the mortgagor may remain in possession until default, but there is no such implication where the covenant is that the mortgagee may enter after default².

1 *Gibbs v Cruickshank* (1873) LR 8 CP 454 at 461.

2 *Wilkinson v Hall* (1837) 4 Scott 301; *Doe d Roylance v Lightfoot* (1841) 8 M & W 553; *Clowes v Hughes* (1870) LR 5 Exch 160; *Gibbs v Cruickshank* (1873) LR 8 CP 454. As to the right of entry see PARA 407.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(3) STATUS OF THE MORTGAGOR IN POSSESSION/343. Attornment clause.

343. Attornment clause.

If by the mortgage deed the mortgagor attorns to the mortgagee, the relationship of landlord and tenant arises between them¹, but the value of such a clause is doubtful². Such a clause is invalid so far as it purports to confer a right to distrain upon any chattels unless registered as a bill of sale³, but the invalidity does not extend to a case where the mortgagee has actually entered into possession and demised the land to the mortgagor as his tenant at a fair and reasonable rent⁴.

An attornment by a mortgagor to a second mortgagee has been held to be valid by estoppel even though the mortgagor has already attorned tenant to the first mortgagee⁵. If an attornment clause in a mortgage purports to create a yearly tenancy, the tenancy will not be construed as being a tenancy at will merely because a power is conferred on the mortgagee to enter and take possession and to determine the tenancy at any time⁶.

1 The relationship of landlord and tenant so created is, however, a purely artificial one: see *Steynning and Littlehampton Building Society v Wilson* [1951] Ch 1018, [1951] 2 All ER 452; *Alliance Building Society v Pinwill* [1958] Ch 788, [1958] 2 All ER 408; *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402, [1965] 3 All ER 673, CA. As to attornment generally see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 3.

2 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2047.

3 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1655; **DISTRESS** vol 13 (2007 Reissue) PARA 916. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 686. Such a clause need not, however, be in the statutory form laid down for a bill of sale by way of security: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1655.

4 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1655; **DISTRESS** vol 13 (2007 Reissue) PARA 916. As to what is a fair and reasonable rent see *Re Thompson, ex p Williams* (1877) 7 ChD 138, CA; *Re Bowes, ex p Jackson* (1880) 14 ChD 725, CA; *Re Knight, ex p Voisey* (1882) 21 ChD 442, CA. The rent may be fluctuating in amount: *Re Knight, ex p Voisey*; *Re Stockton Iron Furnace Co* (1879) 10 ChD 335, CA (a mortgage to secure a current account). As to what amounts to possession by a mortgagee see PARA 410 et seq.

5 *Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA. See also *Morton v Woods* (1869) LR 4 QB 293, Ex Ch; *Jolly v Arbuthnot* (1859) 4 De G & J 224 (attornment to receiver). As to tenancies by estoppel see generally **ESTOPPEL** vol 16(2) (Reissue) PARA 1031 et seq; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 4. In so far as the necessity for invoking an estoppel in the case of attornment to a second mortgagee arose from the fact that the second mortgagee had no legal estate, the position is modified by the fact that a second mortgagee may now have a legal estate: see PARA 190.

6 *Re Threlfall, ex p Queen's Benefit Building Society* (1880) 16 ChD 274, CA. Cf *Walker v Giles* (1848) 6 CB 662, where the scope of the mortgage deed was held to be inconsistent with a tenancy. As to tenancies at will see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 198 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(3) STATUS OF THE MORTGAGOR IN POSSESSION/344. Determination of tenancy created by attornment clause.

344. Determination of tenancy created by attornment clause.

The statutory provision which regulates the length of notice to quit which is required to be given in the case of premises let as a dwelling¹ is intended to protect tenants under true residential lettings and not to protect mortgagors as such against their mortgagees², but it seems that the provision may apply where the rent reserved by an attornment clause is not a mere nominal rent but a full rack rent, or where the terms of the mortgage oblige the mortgagor to reside personally on the premises³. The tenancy created by an attornment clause in a mortgage of agricultural land is not an agricultural tenancy and the statutory provisions

which regulate the length of notices to quit in the case of tenancies of agricultural holdings do not apply to the tenancy so created⁴. Where by a provision in the mortgage deed the tenancy created by an attornment clause is expressly made determinable by re-entry by the mortgagee without notice after default by the mortgagor⁵, the taking of proceedings for possession by the mortgagee is equivalent to re-entry and no notice terminating the tenancy need normally⁶ be given before proceedings are begun⁷. Where, however, the attornment clause provides that a particular length of notice terminating the tenancy must be given, proceedings cannot be brought until such a notice has been given and has expired⁸. Where the tenancy created by an attornment clause is determined, the mortgagor is no longer a tenant who can claim the benefit of the legislation protecting tenants⁹.

1 I.e. the Protection from Eviction Act 1977 s 5: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 214.

2 *Alliance Building Society v Pinwill* [1958] Ch 788, [1958] 2 All ER 408; *Peckham Mutual Building Society v Registe* (1980) 42 P & CR 186.

3 *Alliance Building Society v Pinwill* [1958] Ch 788 at 792, [1958] 2 All ER 408 at 410 per Vaisey J. A tenancy or licence is excluded if it is granted otherwise than for money's worth: see the Protection from Eviction Act 1977 s 3A(7)(b); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 215.

4 *Steynning and Littlehampton Building Society v Wilson* [1951] Ch 1018, [1951] 2 All ER 452. See further **AGRICULTURAL LAND** vol 1 (2008) PARAS 325, 327.

5 As to the effect of such a provision in obviating the necessity for any demand of possession by the mortgagee see PARA 407.

6 As to the statutory provisions which may apply where the rent reserved is a rack rent see the text to notes 1-3.

7 *Woolwich Equitable Building Society v Preston* [1938] Ch 129. See also *Doe d Garrod v Olley* (1840) 12 Ad & El 481; *Doe d Snell v Tom* (1843) 4 QB 615.

8 *Hinckley and Country Building Society v Henny* [1953] 1 All ER 515, [1953] 1 WLR 352.

9 *Portman Building Society v Young* [1951] 1 All ER 191, CA. As to the legislation protecting tenants see PARA 528.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(4) POWER TO GRANT LEASES/345. Express power to grant leases.

(4) POWER TO GRANT LEASES

345. Express power to grant leases.

The mortgagor and the mortgagee¹ may by agreement in writing, whether or not contained in the mortgage² deed, reserve to or confer on the mortgagor or the mortgagee, or both, any further or other powers³ of leasing or having reference to leasing⁴.

1 As to the meanings of 'mortgagor' and 'mortgagee' see PARA 104 note 1.

2 As to the meaning of 'mortgage' see PARA 101 note 4.

3 I.e. any further or other powers than those under the Law of Property Act 1925 s 99: see PARAS 346-350.

4 Any further or other powers so reserved or conferred are exercisable, as far as may be, as if they were conferred by the Law of Property Act 1925, and with all the like incidents, effects, and consequences: s 99(14).

However, the powers so reserved or conferred do not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement: s 99(14) proviso.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(4) POWER TO GRANT LEASES/346. Leases under statutory powers.

346. Leases under statutory powers.

While in possession¹ a mortgagor² of land³ has statutory power as against every incumbrancer⁴ to make from time to time any such lease⁵ of the mortgaged⁶ land, or any part of it, as is authorised by statute⁷. Also, while in possession a mortgagee⁸ of land has a similar statutory power as against all prior incumbrancers, if any, and as against the mortgagor, to make authorised leases of the mortgaged land or any part of it⁹. Every person exercising these powers may execute all necessary assurances¹⁰. For this purpose, 'mortgagor' does not include an incumbrancer deriving title under the original mortgagor¹¹; but a mortgagee who has appointed a receiver of the income of the mortgaged property or any part of it is treated as being in possession so as to entitle him instead of the mortgagor to exercise the statutory powers of leasing as regards the land affected by the receivership so long as the receiver acts, and he may by writing delegate the exercise of any of such powers to the receiver¹². On going into possession, a mortgagee becomes entitled to the benefits of a lease granted by the mortgagor under his statutory power as if he had been a party to it¹³.

A contract for a lease under the statutory power is enforceable by or against every person on whom the lease, if granted, would be binding¹⁴. As far as circumstances admit, the power extends to any letting or to any agreement, whether in writing or not, for leasing or letting¹⁵.

1 A prospective purchaser who is also a prospective mortgagor is not in possession: see *Hughes v Waite* [1957] 1 All ER 603, [1957] 1 WLR 713.

2 As to the meaning of 'mortgagor' see PARA 104 note 1. See also the text to note 11.

3 As to the meaning of 'land' see PARA 104 note 2.

4 As to the meaning of 'incumbrancer' see PARA 223 note 4.

5 'Lease' includes an underlease or other tenancy: Law of Property Act 1925 s 205(1)(xxiii).

6 As to the meaning of 'mortgage' see PARA 101 note 4.

7 See the Law of Property Act 1925 s 99(1). As to the leases authorised by the Act see PARA 348. A mortgagor who has bound himself not to exercise the statutory power of leasing cannot authorise a second mortgagee to do so, for the Law of Property Act 1925 s 99 does not confer on a mortgagee rights which the mortgagor does not himself have: see *Julian S Hodge & Co Ltd v St Helen's Credit Ltd* (1965) 194 Estates Gazette 819. See also the Law of Property Act 1925 s 99(18); and the text to note 11. As to an oral lease of part of the mortgaged land see *Rhodes v Dalby* [1971] 2 All ER 1144, [1971] 1 WLR 1325.

8 As to the meaning of 'mortgagee' see PARA 104 note 1.

9 See the Law of Property Act 1925 s 99(2).

10 See the Law of Property Act 1925 s 99(4).

11 Law of Property Act 1925 s 99(18).

12 See the Law of Property Act 1925 s 99(19).

13 *Municipal Permanent Investment Building Society v Smith* (1888) 22 QBD 70, CA.

14 Law of Property Act 1925 s 99(12).

15 Law of Property Act 1925 s 99(17). See also PARA 349 note 6. An agreement for a lease of more than three years made since 27 September 1989 can only be made in writing: see the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and PARA 118.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(4) POWER TO GRANT LEASES/347. Exclusion or modification of statutory power.

347. Exclusion or modification of statutory power.

The statutory power of leasing¹ only applies if and so far as a contrary intention is not expressed in the mortgage² or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions contained in it³. It cannot, however, be modified or excluded in a mortgage of agricultural land⁴, or so as to prevent the carrying out of an order⁵ for a grant of a new tenancy of business premises⁶. A clause excluding the power does not deprive the mortgagor of his power of creating a lease valid as between himself and the tenant by estoppel⁷, but the statutory provisions for the validation of imperfect leases granted in intended exercise of powers of leasing⁸ do not render such a lease valid against the mortgagee⁹. Where a mortgage excluded the statutory power of leasing except with the consent of mortgagees but provided that a lessee should not be concerned to see that any such consent had been given, the mortgagees were held to be estopped from denying that a lease had been granted with their consent¹⁰. The statutory power of leasing may be extended by agreement in writing, without prejudice to the rights of other mortgagees¹¹.

A standard clause in a domestic mortgage by which the mortgagor agrees not to let the mortgaged property without the consent of the mortgagee does not contravene the right of workers to freedom of movement within the European Union¹², nor can it be implied that the mortgagee will act reasonably in considering a request by the mortgagor for consent to let the property¹³. A mortgagee who refuses to consider a request to let the mortgaged property does not thereby act in bad faith¹⁴.

1 As to the statutory power of leasing see PARA 346. As to the meaning of 'lease' see PARA 346 note 5.

2 As to the meaning of 'mortgage' see PARA 101 note 4.

3 Law of Property Act 1925 s 99(13) (amended by the Agricultural Tenancies Act 1995 s 31(2)).

4 See the Law of Property Act 1925 s 99(13A) (s 99(13A), (13B) added by the Agricultural Tenancies Act 1995 s 31(3)). This provision does not enable the application of the statutory power of leasing to be excluded or restricted in relation to any mortgage of agricultural land made after 1 March 1948 but before 1 September 1995; and does not enable the power to grant a lease of an agricultural holding to which the Agricultural Holdings Act 1986 applies (ie by virtue of the Agricultural Tenancies Act 1995) to be excluded or restricted in relation to any mortgage of agricultural land made on or after 1 September 1995: Law of Property Act 1925 s 99(13A)(a), (b) (as so added). For these purposes, 'agricultural holding' has the same meaning as in the Agricultural Holdings Act 1986 (see **AGRICULTURAL LAND** vol 1 (2008) PARA 323); and 'agricultural land' has the same meaning as in the Agriculture Act 1947 (see **AGRICULTURAL LAND** vol 1 (2008) PARA 644): Law of Property Act 1925 s 99(13B) (as so added). See also **AGRICULTURAL LAND** vol 1 (2008) PARA 421. However, an exclusion clause may have a residual effect making the granting of a tenancy under common law powers a breach of the mortgagor's obligations: *Rhodes v Dalby* [1971] 2 All ER 1144, [1971] 1 WLR 1325.

5 Ie under the Landlord and Tenant Act 1954 s 36: see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 756-757.

6 See the Landlord and Tenant Act 1954 s 36(4).

7 *Iron Trades Employers Insurance Association Ltd v Union House and Land Investors Ltd* [1937] Ch 313, [1937] 1 All ER 481. See also *Rust v Goodale* [1957] Ch 33 at 45, [1956] 3 All ER 373 at 381 per Harman J. As to the creation of leases by estoppel see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 4.

8 le under the Law of Property Act 1925 s 152: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 145-146.

9 *Iron Trades Employers Insurance Association Ltd v Union of House and Land Investors Ltd* [1937] Ch 313, [1937] 1 All ER 481, distinguished on this point in *Pawson v Revell* [1958] 2 QB 360, [1958] 3 All ER 233, CA. See also PARA 349 note 6.

10 *Lever Finance Ltd v Needleman Property Trustee* [1956] Ch 375, [1956] 2 All ER 378, distinguishing *Dudley and District Benefit Building Society v Emerson* [1949] Ch 707, [1949] 2 All ER 252, CA. See also *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA. See further **ESTOPPEL** vol 16(2) (Reissue) PARA 1031 et seq.

11 See PARA 345.

12 *Citibank International plc v Kessler* [1992] 2 CMLR 603, [1999] NPC 32, CA. As to free movement of persons within the European Union see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 225; **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 116.

13 *Citibank International plc v Kessler* [1992] 2 CMLR 603, [1999] NPC 32, CA; *Starling v Lloyds TSB Bank plc* [2000] Lloyd's Rep Bank 8, [2000] 1 EGLR 101, CA.

14 *Starling v Lloyds TSB Bank plc* [2000] Lloyd's Rep Bank 8, [2000] 1 EGLR 101, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(4) POWER TO GRANT LEASES/348. Leases authorised.

348. Leases authorised.

The leases authorised by the statutory power¹ are agricultural² or occupation³ leases for any term not exceeding 50 years, and building leases⁴ for any term not exceeding 99 years⁵. In the case of a mortgage⁶ of leasehold land⁷, a lease granted under the statutory power must reserve a reversion of not less than one day⁸. Every such lease must be made to take effect in possession not later than 12 months after its date⁹. It must not be of the mortgaged property and other property at a single rent¹⁰. It may contain a power for the lessee to determine the lease within the term, and it is not invalidated because it contains an option for the lessee to take a new lease at the end of the term, although the lessee cannot require the mortgagor to grant a renewed lease unless the lease is at the time of renewal a proper one to be granted under the statutory provisions¹¹.

1 As to the statutory power see PARA 346. As to the meaning of 'lease' see PARA 346 note 5.

2 An agricultural lease does not cease to be such because of the reservation of sporting rights: *Brown v Peto* [1900] 1 QB 346 at 354 per Bigham J; affd [1900] 2 QB 653, CA.

3 A lease of a house, furniture and sporting rights at a single rent is an occupation lease: *Brown v Peto* [1900] 2 QB 653, CA. See also *Sheehy v Lord Muskerry* (1848) 1 HL Cas 576 at 589; *Edwards v Millbank* (1859) 4 Drew 606 at 613.

4 A 'building lease' is a lease for building purposes or purposes connected therewith; and 'building purposes' include the erecting and improving of, and the adding to, and the repairing of buildings: Law of Property Act 1925 s 205(1)(iii).

5 See the Law of Property Act 1925 s 99(3). Where the mortgage was made before 1 January 1926, the leases authorised are agricultural or occupation leases not exceeding 21 years and building leases not exceeding 99 years: see s 99(3).

6 As to the meaning of 'mortgage' see PARA 101 note 4.

7 As to the meaning of 'land' see PARA 104 note 2.

8 Law of Property Act 1925 s 99(15) proviso.

9 Law of Property Act 1925 s 99(5).

10 *King v Bird* [1909] 1 KB 837.

11 *King v Bird* [1909] 1 KB 837 at 845.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(4) POWER TO GRANT LEASES/349. Rent.

349. Rent.

A lease granted under the statutory power¹ must reserve the best rent² that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken³. It seems that where a tenant is granted possession on payment of a lump sum, calculated by reference to a rack rent over a period, the payment is not rent for this purpose, but a fine⁴. It must contain a covenant by the lessee⁵ for payment of such rent, and a condition of re-entry if the rent is not paid within a period to be specified in the lease, not exceeding 30 days⁶. In the case of a building lease⁷, a peppercorn rent or a nominal or other rent less than the rent ultimately payable may be made payable for the first five years, or any less part of the term⁸. The adequacy of the rent reserved must be judged by the particular circumstances⁹. A lessor is justified in taking a rent from a good tenant substantially less than that offered by an inferior tenant, and the court will not, unless it is satisfied that the inadequacy is substantial, interfere with a rent which is the result of a bona fide bargain between the mortgagor and the lessee¹⁰. However, it seems that the mortgagor cannot accept a lump sum as rent for future years¹¹, although a mortgagee will be bound by such an arrangement made prior to the mortgage¹². It is uncertain whether or not the rent can be left to be fixed by a valuer later¹³.

1 As to the statutory power of leasing see PARA 346. As to the meaning of 'lease' see PARA 346 note 5.

2 As to the meaning of 'rent' see PARA 338 note 7.

3 Law of Property Act 1925 s 99(6). As to the meaning of 'fine' see PARA 338 note 7.

4 See *Hughes v Waite* [1957] 1 All ER 603, [1957] 1 WLR 713, where a tenancy was purported to be created before the mortgage and before the mortgagor had any title to the property, but it was held that such a tenancy could not have been validly created after the mortgage in exercise of the statutory power. Cf *Grace Rymer Investments Ltd v Waite* [1958] Ch 831, [1958] 2 All ER 777, CA.

5 'Lessee' includes an underlessee and a person deriving title under a lessee or underlessee: Law of Property Act 1925 s 205(1)(xxiii).

6 Law of Property Act 1925 s 99(7). This provision may not be applicable to an oral letting (cf s 99(17); and PARA 346), but even if the oral letting is thereby rendered an ineffective exercise of the statutory power, the letting may be made valid by virtue of s 152 (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 145-146): see *Pawson v Revell* [1958] 2 QB 360, [1958] 3 All ER 233, CA; *Rhodes v Dalby* [1971] 2 All ER 1144, [1971] 1 WLR 1325.

7 As to the meaning of 'building lease' see PARA 348 note 4.

8 Law of Property Act 1925 s 99(10).

9 *Coutts & Co v Somerville* [1935] Ch 438.

- 10 Cf *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169 at 195.
- 11 *Municipal Permanent Investment Building Society v Smith* (1888) 22 QBD 70, CA.
- 12 *Green v Rheinberg* (1911) 104 LT 149, CA. See also *Grace Rymer Investments Ltd v Waite* [1958] Ch 831 at 847, [1958] 2 All ER 777 at 781-782, CA, per Lord Evershed MR.
- 13 See *Lloyds Bank Ltd v Marcan* [1973] 3 All ER 754 at 761, [1973] 1 WLR 1387 at 1392, CA, per Goulding J.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(4) POWER TO GRANT LEASES/350. Counterpart.

350. Counterpart.

A counterpart of every lease¹ must be executed by the lessee² and delivered to the lessor³. If the lease is made by the mortgagor⁴, then within one month after making the lease, he must deliver to the mortgagee⁵ or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee is not concerned to see that this provision is complied with⁶.

- 1 As to the meaning of 'lease' see PARA 346 note 5.
- 2 As to the meaning of 'lessee' see PARA 349 note 5.
- 3 See the Law of Property Act 1925 s 99(8). 'Lessor' includes an underlessor and a person deriving title under a lessor or underlessor: s 205(1)(xxiii). Execution of the lease by the lessor is, in favour of the lessee and all persons deriving title under him, sufficient evidence of execution and delivery: see s 99(8). This requirement does not apply to an oral tenancy: see *Rhodes v Dalby* [1971] 2 All ER 1144, [1971] 1 WLR 1325. Cf *Pawson v Revell* [1958] 2 QB 360, [1958] 3 All ER 233, CA.
- 4 As to the meaning of 'mortgagor' see PARA 104 note 1.
- 5 As to the meaning of 'mortgagee' see PARA 104 note 1.
- 6 Law of Property Act 1925 s 99(11). See also *Public Trustee v Lawrence* [1912] 1 Ch 789, where an extended statutory power of leasing was held to be subject to this provision.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(5) SURRENDER OF LEASES/351. Position apart from statute.

(5) SURRENDER OF LEASES

351. Position apart from statute.

A mortgagor has no general power to accept a surrender of a lease of the mortgaged property even if the lease was made by him under his statutory powers¹. If a mortgagor has granted a tenancy before a mortgage which prohibits leasing without the mortgagee's consent, and subsequently without the mortgagee's consent purports to grant a new tenancy to the same tenant, the fresh grant is invalid and any surrender of the original tenancy by operation of law is ineffective². If the fresh grant is invalid but there is a separate surrender by deed of the old tenancy, it seems that the surrender may be voidable and liable to be set aside so long as the term granted under the old tenancy would apart from the surrender still be running, but that, otherwise, the surrender is effective³.

1 *Robbins v Whyte* [1906] 1 KB 125. As to the statutory power of leasing see PARA 346. As to surrender generally see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 630 et seq.

2 *Barclays Bank Ltd v Stasek* [1957] Ch 28, [1956] 3 All ER 439, following *Cadle v Moody* (1861) 30 LJ Ex 385 (where the new tenancy was purported to be granted to a fresh tenant); *Doe d Earl of Egremont v Courtenay* (1848) 11 QB 702; *Doe d Biddulph v Poole* (1848) 11 QB 713. For a case where a power authorising the mortgagor to grant leases was held not to enable him to determine pre-existing tenancies see *Miles v Murphy* (1871) 1R 5 CL 382.

3 *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257 at 267-268, [1959] 1 WLR 465 at 476-477 per Harman J. A surrender so expressed as to show the intentions of the parties to make the surrender only in consideration of the grant would apparently be a conditional surrender, and void, if the grant should be void: see *Doe d Earl of Egremont v Courtenay* (1848) 11 QB 702; *Doe d Biddulph v Poole* (1848) 11 QB 713.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(5) SURRENDER OF LEASES/352. Statutory powers of mortgagor and mortgagee.

352. Statutory powers of mortgagor and mortgagee.

For the purpose only of enabling an authorised lease¹ to be granted, a mortgagor of land², while in possession, has power, as against every incumbrancer, to accept a surrender of the whole or any part of the land comprised in the lease, with or without an exception in respect of all or any of the mines and minerals³ in it, and on a surrender of part of the land, or mines or minerals leased, the rent may be apportioned⁴, and the original lease may be varied if the lease so varied would have been an authorised lease if granted by the person accepting the surrender⁵. A mortgagee in possession⁶ has, as against prior or other incumbrancers and the mortgagor, similar powers⁷.

These powers do not authorise surrenders to a mortgagor without the consent of the incumbrancer or prior incumbrancer for any consideration except an agreement to accept an authorised lease⁸.

1 'Authorised lease' means a lease authorised under the Law of Property Act 1925 s 99 (see PARAS 346-350), or under an agreement made pursuant to that provision, or by the mortgage deed: see s 100(1). As to the meaning of 'lease' see PARA 346 note 5. Section 100 may be excluded by the mortgagor and mortgagee in the mortgage deed or otherwise in writing: see s 100(7). Cf s 99(13) (see PARA 347). For the purposes of s 100, 'mortgagor' does not include an incumbrancer deriving title under the original mortgagor: s 100(12). As to the meanings of 'mortgagor' and 'mortgagee' see PARA 104 note 1. As to the meaning of 'mortgage' see PARA 101 note 4. As to the meaning of 'incumbrancer' see PARA 223 note 4.

2 As to the meaning of 'land' see PARA 104 note 2.

3 As to the meaning of 'mines and minerals' see PARA 104 note 2.

4 Law of Property Act 1925 s 100(1). Section 100 applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions contained in it: s 100(7).

5 Law of Property Act 1925 s 100(3). On a surrender and the making of a new or other lease, whether for the same or for any extended or other term, and whether subject or not to the same or to any other covenants, provisions or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of the nature of the covenants, provisions and conditions to be inserted in the new or other lease: s 100(3). As to the meaning of 'lessee' see PARA 349 note 5. As to the meaning of 'rent' see PARA 338 note 7.

6 A mortgagee who has appointed a receiver of the income of the mortgaged property or any part of it under the statutory powers is, so long as the receiver acts, treated as in possession of the land affected so as to entitle him to exercise the statutory powers of accepting surrenders instead of the mortgagor, and the

mortgagee may by writing delegate any such powers to the receiver: see the Law of Property Act 1925 s 100(13).

7 See the Law of Property Act 1925 s 100(2).

8 See the Law of Property Act 1925 s 100(4).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(5) SURRENDER OF LEASES/353. Essentials to validity of surrender.

353. Essentials to validity of surrender.

A surrender by virtue of the statutory powers¹ is invalid unless: (1) an authorised lease² is granted of the whole of the land³ or mines and minerals⁴ comprised in the surrender to take effect in possession immediately or within one calendar month after the date of the surrender⁵; (2) the term certain or other interest granted by the new lease is not less in duration than the unexpired term or interest which would have been subsisting under the old lease if it had not been surrendered⁶; and (3) if the whole of the land, mines and minerals originally leased has been surrendered, the rent⁷ reserved by the new lease is not less than the rent under the original lease, or, if part only has been surrendered, the aggregate rents remaining payable or reserved under the original and the new lease are not less than the rent payable if there had been no surrender⁸.

1 As to the statutory powers of surrender see PARA 352.

2 As to the meaning of 'authorised lease' see PARA 352 note 1. As to the meaning of 'lease' see PARA 346 note 5.

3 As to the meaning of 'land' see PARA 104 note 2.

4 As to the meaning of 'mines and minerals' see PARA 104 note 2.

5 See the Law of Property Act 1925 s 100(5)(a).

6 See the Law of Property Act 1925 s 100(5)(b).

7 As to the meaning of 'rent' see PARA 338 note 7.

8 See the Law of Property Act 1925 s 100(5)(c).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(5) SURRENDER OF LEASES/354. Operation of statutory powers.

354. Operation of statutory powers.

A contract to make or accept an authorised surrender¹ may be enforced by or against every person on whom the surrender, if completed, would be binding².

The statutory powers of accepting surrenders³ do not authorise a surrender which could not have been accepted by the mortgagor⁴ with the concurrence of all the incumbrancers⁵ before 1 January 1912⁶, but the mortgagor and mortgagee⁷ may by agreement in writing, whether or not contained in the mortgage⁸ deed, reserve or confer further powers of accepting surrenders⁹.

The statutory powers of accepting surrenders apply, so far as the circumstances admit, to any letting and to an agreement, whether in writing or not, for leasing or letting¹⁰.

- 1 le a surrender authorised under the Law of Property Act 1925 s 100: see PARAS 352-353.
- 2 Law of Property Act 1925 s 100(6). Cf s 99(12) (see PARA 346).
- 3 le the powers under the Law of Property Act 1925 s 100: see PARAS 352-353.
- 4 As to the meaning of 'mortgagor' see PARA 104 note 1.
- 5 As to the meaning of 'incumbrancer' see PARA 223 note 4.
- 6 See the Law of Property Act 1925 s 100(11).
- 7 As to the meaning of 'mortgagee' see PARA 104 note 1.
- 8 As to the meaning of 'mortgage' see PARA 101 note 4.
- 9 See the Law of Property Act 1925 s 100(10). However, the powers reserved or conferred must not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement: see s 100(10) proviso.
- 10 See the Law of Property Act 1925 s 100(9).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(6) RIGHTS AND LIABILITIES AS REGARDS TENANTS/355. Validly granted leases.

(6) RIGHTS AND LIABILITIES AS REGARDS TENANTS

355. Validly granted leases.

The rights and liabilities of the mortgagor and tenant under a lease granted before the mortgage or pursuant to express or statutory powers are considered elsewhere in this title¹.

- 1 See PARAS 339-340.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(6) RIGHTS AND LIABILITIES AS REGARDS TENANTS/356. Leases granted by mortgagor ultra vires.

356. Leases granted by mortgagor ultra vires.

A tenant under a lease granted ultra vires is, until eviction, actual or constructive, by paramount title estopped from denying the mortgagor's title, and therefore is bound to pay the rent to the mortgagor; but payment of the rent to a mortgagee who demands it, and threatens eviction in case of refusal, is a good payment against the mortgagor or his assignee both in respect of rent accruing due after the demand, and of rent which accrued due before the demand but was then unpaid¹. To constitute an eviction, it is not necessary that the tenant be put out of possession or that proceedings be brought; a threat of eviction directed to anyone in actual occupation is sufficient².

1 *Johnson v Jones* (1839) 9 Ad & El 809; *Boodle v Cambell* (1844) 7 Man & G 386; *Delaney v Fox* (1857) 2 CBNS 768; *Underhay v Read* (1887) 20 QBD 209, CA. Notice alone is not sufficient: *Alchorne v Gomme* (1824) 2 Bing 54; *Waddilove v Barnett* (1836) 2 Bing NC 538; *Trent v Hunt* (1853) 9 Exch 14; *Hickman v Machin* (1859) 4 H & N 716. See also *Wilton v Dunn* (1851) 17 QB 294.

2 *Sadiq v Hussain* [1997] NPC 19, CA. See also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 271 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(6) RIGHTS AND LIABILITIES AS REGARDS TENANTS/357. Lessee's remedies.

357. Lessee's remedies.

A lessee under a lease granted ultra vires may claim damages against the mortgagor for eviction, but may not obtain an order that the mortgagor is to pay off the mortgage and so acquire the legal estate and be able to give effect to the contract¹.

1 *Costigan v Hastler* (1804) 2 Sch & Lef 160; *Carpenter v Parker* (1857) 3 CBNS 206; *Howe v Hunt* (1862) 31 Beav 420.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(7) LIABILITY FOR WASTE/358. Liability of mortgagor.

(7) LIABILITY FOR WASTE

358. Liability of mortgagor.

The power of the mortgagor while in possession to exercise all the rights of ownership¹ is subject to the limitation that he may not diminish the security so as to render it insufficient. Waste² by a mortgagor in possession, for example by felling timber or pulling down a house, will be restrained by injunction on proof that the security is being made deficient³, or after order for foreclosure without such proof⁴.

1 See PARA 338.

2 As to waste generally see **AGRICULTURAL LAND** vol 1 (2008) PARA 613; **CIVIL PROCEDURE** vol 11 (2009) PARAS 439-441; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 431-435; **SETTLEMENTS** vol 42 (Reissue) PARA 986 et seq.

3 *Usborne v Usborne* (1740) 1 Dick 75; *Hippesley v Spencer* (1820) 5 Madd 422; *Hampton v Hodges* (1803) 8 Ves 105; *King v Smith* (1843) 2 Hare 239 at 243; *Simmins v Shirley* (1877) 6 ChD 173. See further PARA 359.

4 *Goodman v Kine* (1845) 8 Beav 379 (pulling down a house); *Farrant v Lovel* (1750) 3 Atk 723. As to the right of the mortgagee to protect his security see further PARA 393 et seq. As to foreclosure see PARA 566 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(7) LIABILITY FOR WASTE/359. Felling of timber and removal of fixtures.

359. Felling of timber and removal of fixtures.

The mortgagee's right to restrain the felling of timber on property which is an insufficient security¹ is unaffected by the fact that the timber ought in a prudent course of management to be cut².

It seems that a mortgagee might restrain the removal of fixtures if the removal rendered the security insufficient³.

1 See PARA 358.

2 *Harper v Aplin* (1886) 54 LT 383.

3 *Ellis v Glover and Hobson Ltd* [1908] 1 KB 388, CA; *Ackroyd v Mitchell* (1860) 3 LT 236.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(8) OTHER RIGHTS AND LIABILITIES/360. Injury to property.

(8) OTHER RIGHTS AND LIABILITIES

360. Injury to property.

So long as he is entitled to possession or receipt of rents and profits, a mortgagor of land has statutory power to bring proceedings in his own name only to prevent, or recover damages in respect of, any trespass or other wrong in relation to the mortgaged property¹. Apart from statute, a mortgagor of land in receipt of rents and profits or a mortgagor of personalty has been held to possess sufficient interest, even though the interest may be only equitable², to enable him to bring proceedings to restrain or recover damages for an injury to the mortgaged property without joining the mortgagee³. If the questions raised in the proceedings concern the mortgagee, so that the whole matter cannot be settled in his absence, the defendant can claim that the mortgagee should be made a party to the proceedings as co-defendant⁴.

1 See the Law of Property Act 1925 s 98; and PARA 338.

2 As to the principle that before 1926 the interest of a mortgagor of land in the mortgaged property was merely equitable see PARA 302.

3 *Fairclough v Marshall* (1878) 4 ExD 37, CA (action to restrain breach of covenant relating to land); *Van Gelder, Apsimon & Co v Sowerby Bridge United District Flour Society* (1890) 44 ChD 374, CA (action for damages and injunction for infringement of patent); *Ocean Accident and Guarantee Corp Ltd v Ilford Gas Co* [1905] 2 KB 493 at 497, CA. Cf *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 14, HL, where the exception in favour of a mortgagor from the rule that the legal owner must be joined in proceedings for a perpetual injunction was treated as possibly based on the statutory power of the mortgagor to sue (see the text to note 1). See also **CIVIL PROCEDURE** vol 11 (2009) PARA 472 et seq.

4 *Fairclough v Marshall* (1878) 4 ExD 37, CA; *Van Gelder, Apsimon & Co v Sowerby Bridge United District Flour Society* (1890) 44 ChD 374, CA. See also CPR 19.1, 19.3; *Practice Direction--Addition and Substitution of Parties* PD 19; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 210, 211.

Where a mortgagee is in possession, his right of possession relates back to the time when his right to possession accrued, so as to entitle him to sue for trespass committed before his entry: see PARA 398.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/6. RIGHTS AND LIABILITIES OF THE MORTGAGOR/(8) OTHER RIGHTS AND LIABILITIES/361. Mortgagor allowing judgment to go by default.

361. Mortgagor allowing judgment to go by default.

If a mortgagor allows judgment to go against himself in proceedings brought by a stranger to recover possession of the mortgaged property, the mortgagee may apply after judgment for an order setting aside the judgment¹.

¹ *Jacques v Harrison* (1884) 12 QBD 165, CA; *Rexhaven Ltd v Nurse* (1995) 28 HLR 241, [1995] EGCS 125. See further CPR Pt 13; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 516-518.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(1) EXTENT OF THE MORTGAGEE'S INTEREST/362. In general.

7. ESTATE AND INTEREST OF THE MORTGAGEE

(1) EXTENT OF THE MORTGAGEE'S INTEREST

362. In general.

Although a mortgagee under a legal mortgage takes a term of years¹, and a mortgagee under a legal charge has the same protection, powers and remedies as if he had been granted a term of years², he takes this only to the extent to which the mortgagor is able to grant it; but, so far as is required to support the demise, all the mortgagor's estate and interest passes³. A mortgage of an equitable interest can, however, still be made by conveyance and vests the interest in the mortgagee subject to the mortgagor's equity of redemption⁴.

¹ See PARAS 190-195.

² See PARA 191.

³ See PARA 194.

⁴ See also PARA 238. For the purposes of the Law of Property Act 1925, 'conveyance' includes a mortgage (see s 205(1)(ii); and PARA 194 note 1), and the 'all estate' clause is implied subject to the terms of the conveyance (see s 63(1), (2); and PARA 194). As to 'all estate' clauses see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 240-241.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(1) EXTENT OF THE MORTGAGEE'S INTEREST/363. Rights and liabilities dependent on nature of interest.

363. Rights and liabilities dependent on nature of interest.

The mortgagee has the rights and is subject to the liabilities which are incident to the estate vested in him; hence, if he has acquired a legal estate in the premises, he has, in general, all the rights of a legal owner, both as against the mortgagor and as against third persons¹, and he is subject to the liabilities which fall on a legal owner².

In the case of a registered charge³, the registered proprietor or person entitled to be registered as proprietor is entitled to exercise owner's powers⁴. Owner's powers in relation to a registered charge consist of:

- 29 (1) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage⁵; and
- 30 (2) power to charge at law with the payment of money indebtedness secured by the registered charge⁶.

Thus in the case of a mortgage of shares by actual transfers the mortgagee assumes the shareholder's liability⁷, and unless the mortgagor asserts his right of redemption he is under no liability to indemnify the mortgagee against these liabilities⁸. If a mortgagee has acquired an equitable interest only he does not have the rights of a legal owner, and he loses the protection sometimes afforded by the possession of the legal estate⁹, but he does not incur a legal owner's liabilities¹⁰.

Where the mortgage is by way of equitable charge only¹¹, the mortgagee takes no estate in the premises, but he has an equitable interest enforceable by sale and sometimes by foreclosure¹².

1 As long as the mortgagor is in possession he has, by statute, a legal owner's rights for certain purposes: see eg PARA 297.

2 As to a mortgagee's liabilities on covenants see PARAS 432-433.

3 As to the meaning of 'registered charge' see PARA 159 note 7. As to the meaning of 'registered' see PARA 155 note 3.

4 See the Land Registration Act 2002 s 24.

5 See the Land Registration Act 2002 s 23(2)(a). 'Legal sub-mortgage' means (1) a transfer by way of mortgage; (2) a sub-mortgage by sub-demise; and (3) a charge by way of legal mortgage: s 23(3). As to the meaning of 'legal mortgage' see PARA 104 note 1.

6 See the Land Registration Act 2002 s 23(2)(b).

7 See PARA 237. See also **COMPANIES** vol 14 (2009) PARA 362 et seq.

8 *Phené v Gillan* (1845) 5 Hare 1.

9 See PARAS 262-263; and **EQUITY** vol 16(2) (Reissue) PARA 570 et seq.

10 The fact that the equitable mortgagee had gone into possession and paid rent did not entitle the lessor to require him to take a legal assignment: *Moore v Greg* (1848) 2 Ph 717. As to the position of an equitable mortgagee of shares see PARA 245.

11 See PARAS 106, 118 et seq. As to legal charges see PARA 191.

12 See PARAS 106, 568.

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(2) ASSIGNMENT AND DEVOLUTION

(i) Transfer of Mortgage

364. Mortgagee's right to transfer.

The mortgagee is entitled to transfer his mortgage, and he may do this either absolutely or by way of sub-mortgage¹. Where a mortgagor² is entitled to redeem, he has power³ to require the mortgagee⁴, instead of reconveying or surrendering, to assign the mortgage⁵ debt and convey the mortgaged property to any third person, as the mortgagor directs⁶. However, this power cannot be exercised if the mortgagee is or has been in possession⁷. After a mortgagee has been in possession, he cannot with safety transfer his security except under the court's direction, as otherwise he might be liable for the transferee's neglect or default⁸.

Where there are subsequent incumbrancers⁹, the power can be exercised by any incumbrancer or by the mortgagor notwithstanding any intermediate incumbrance¹⁰. Any incumbrancer can exercise it in preference to the mortgagor, and as between incumbrancers it is exercisable in the order of their priority¹¹; but this does not authorise a first mortgagee to join in a conveyance on sale by the mortgagor to the prejudice of a subsequent incumbrancer¹². A mortgagee is not safe in transferring to the mortgagor or mortgagor's nominee without the consent of subsequent incumbrancers of whom he has notice¹³.

1 *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273 at 279; *Taylor v Russell* [1892] AC 244 at 255, HL. A mortgagee of shares by blank transfer where the transfer requires to be under hand only has, perhaps, only authority to insert his own name, not that of a sub-mortgagee, and procure registration of himself; although, after he has done this, he can transfer his mortgage title: *France v Clark* (1883) 22 ChD 830; affd (1884) 26 ChD 257, CA. See also PARA 237. As to the right to sub-mortgage see PARAS 250-257.

2 As to the meaning of 'mortgagor' see PARA 104 note 1.

3 He is subject to compliance with the terms on compliance with which he would be entitled to require a reconveyance or surrender: see the Law of Property Act 1925 s 95(1).

4 As to the meaning of 'mortgagee' see PARA 104 note 1.

5 As to the meaning of 'mortgage' see PARA 101 note 4.

6 See the Law of Property Act 1925 s 95(1). This applies whenever the mortgage was made, and notwithstanding any stipulation to the contrary: s 95(5). 'Mortgage' includes charge or lien (see PARA 101 note 4), and hence a shareholder can require the company to transfer to his nominee its lien on his shares for a debt due from him (*Everitt v Automatic Weighing Machine Co* [1892] 3 Ch 506).

7 See the Law of Property Act 1925 s 95(3). The case of the mortgagee being in possession is excluded, because he remains liable to account as mortgagee in possession notwithstanding the transfer: see PARA 429.

8 See *Hall v Heward* (1886) 32 ChD 430 at 435, CA; and PARA 629.

9 As to the meanings of 'incumbrancer' and 'incumbrance' see PARA 223 note 4.

10 See the Law of Property Act 1925 s 95(2), which overruled the construction placed on the Conveyancing Act 1881 s 15 (repealed) in *Teevan v Smith* (1882) 20 ChD 724, CA, namely that the mortgagee could only be required to transfer at the direction of a person who could call for a reconveyance, that is, in the case of subsequent incumbrancers, the second mortgagee. Perhaps, in a foreclosure suit, the mortgagee cannot be required to transfer to a person who is not a party: *Smithett v Hesketh* (1890) 44 ChD 161 at 165 per North J.

11 See the Law of Property Act 1925 s 95(2).

12 *West London Commercial Bank v Reliance Permanent Building Society* (1885) 29 ChD 954, CA.

13 *Re Magneta Time Co Ltd, Molden v Magneta Time Co Ltd* (1915) 84 LJCh 814.

365. Nature and form of transfer.

The mortgage security consists of the debt and the interest in the mortgaged property by which the debt is secured, and a transfer consists of an assignment of the debt and a conveyance of this interest¹.

Unless a contrary intention is expressed in the transfer, and subject to any provisions contained in it, a transfer by deed of the mortgage² or the benefit of it operates to convey to the transferee³:

- 31 (1) the right to demand, sue for, recover and give receipts for the mortgage money or the unpaid part of it, and the interest then due, if any, and to become due on it⁴;
- 32 (2) the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all the mortgagee's powers⁵; and
- 33 (3) all the estate and interest in the mortgaged property then vested in the mortgagee subject to redemption or cesser, but subject to the right of redemption then subsisting⁶.

These provisions do not extend to a transfer of a bill of sale of chattels by way of security⁷, or of a registered charge of registered land⁸, but otherwise they are not restricted, and apply not only to mortgages of freehold and leasehold property, but to mortgages of property generally⁹.

There is a statutory form of transfer of mortgage which may be used with such variations and additions, if any, as the circumstances may require¹⁰.

As a transfer of the security carries the benefit of the debt, it is kept alive in favour of a subsequent incumbrancer who pays off the mortgage and takes a conveyance of the property, even though the debt is not expressly assigned¹¹; but an express assignment of the benefit of the security will not keep alive the liability of a surety who, by other terms of the deed, is released¹².

1 As to the terms implied in a transfer by deed see heads (1)-(3) in the text. As to the form of transfer see the text to note 10; and PARA 366 et seq. As to the transfer of registered charges see the Land Registration Act 2002 s 27; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 911 et seq.

2 As to the meaning of 'mortgage' see PARA 101 note 4.

3 'Transferee' includes his personal representatives and assigns: Law of Property Act 1925 s 114(2). In general, express powers pass to a transferee by virtue of a definition clause, or by conferring the powers expressly on the mortgagee and his assigns. The statutory powers are vested in him by virtue of the provision that 'mortgagee' includes any person from time to time deriving title under the original mortgagee: see s 205(1)(xvi); and PARA 104 note 1. As to the person entitled to exercise the power of sale see s 106(1); and PARAS 451-452.

4 Law of Property Act 1925 s 114(1)(a).

5 Law of Property Act 1925 s 114(1)(b).

6 Law of Property Act 1925 s 114(1)(c).

7 Law of Property Act 1925 s 114(5).

8 See *Paragon Finance plc v Pender* [2005] EWCA Civ 760, [2005] 1 WLR 3412, [2005] All ER (D) 307 (Jun); *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244, [2007] All ER (D) 156 (Dec). As to the transfer of a registered charge see the Land Registration Act 2002 s 27; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 911 et seq.

9 'Mortgage' includes any charge or lien on any property: see the Law of Property Act 1925 s 205(1)(xvi); and PARA 101 note 4.

10 See the Law of Property Act 1925 s 114(3), Sch 3 Form 1.

11 *Phillips v Gutteridge* (1859) 4 De G & J 531. This seems so notwithstanding the Law of Property Act 1925 s 116 (see PARA 642), although having regard to the present methods of transfer, that is to say, either by transfer in the statutory form or by indorsed receipt (see PARAS 366, 369), the question is not likely to arise.

12 *Bolton v Buckenham* [1891] 1 QB 278, CA.

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366. Manner of transfer.

A transfer of a mortgage is usually made by deed, and this is essential in order to pass the mortgagee's legal estate in unregistered¹ freehold or leasehold property², or to obtain the benefit of provisions as to the operation of transfers contained in the Law of Property Act 1925³. As regards the mortgage debt, however, an assignment under hand only is effectual, notwithstanding that it was created by deed⁴; and an assignment under hand is effectual to pass any equitable interest in property which is vested in the mortgagee⁵.

1 As to the transfer of a registered charge see the Land Registration Act 2002 s 27; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 911 et seq.

2 See the Law of Property Act 1925 s 52(1); and PARA 104.

3 See the Law of Property Act 1925 s 114; and PARA 365.

4 See the Law of Property Act 1925 s 136; and **CHOSSES IN ACTION** vol 13 (2009) PARA 72 et seq. See also PARA 139.

5 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 139-143.

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367. Transfer of equitable mortgage by deposit.

Since 27 September 1989¹ an equitable mortgage of or charge on land or any interest in land can only be made in writing². In cases where an equitable mortgage has been effectively created by deposit of title deeds, any assignment of such an interest should be in writing³. A transferee who pays off the mortgagee and takes delivery of the deeds without any assignment in writing may be subrogated to the rights of the mortgagee⁴. A mortgagee by deposit could formerly create a sub-mortgage, effective to the extent of his own charge, by handing over the deeds⁵. Where after a deposit of deeds with a firm of bankers to secure a current account there is a change in the firm, and a continuance of dealings with the new firm, the benefit of the equitable mortgage passes to the new firm⁶.

- 1 le the commencement date of the Law of Property (Miscellaneous Provisions) Act 1989 s 2: see s 5.
- 2 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and PARA 118. As to the position before 27 September 1989 see PARA 119 et seq.
- 3 *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396, CA. See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 24, 148.
- 4 See *Brocklesby v Temperance Permanent Building Society* [1895] AC 173 at 182-183, HL; and PARAS 584-585. As to personal property see *France v Clark* (1884) 26 ChD 257 at 261, CA.
- 5 *Rayne v Baker* (1859) 1 Giff 241. See also PARA 131.
- 6 *Re Worters, ex p Oakes* (1841) 2 Mont D & De G 234; *Re O'Brien* (1883) 11 LR Ir 213.

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368. Variations in form.

The form of the transfer, whether it is in full terms or in short terms authorised by the Law of Property Act 1925¹, varies according as to whether the mortgagor is or is not a party, and may vary according as to whether he has or has not created a subsequent incumbrance. It is desirable for the mortgagor to be a party in order that he may be bound by the recital as to the state of the mortgage debt, and he usually enters into a new covenant with the transferee for payment of the mortgage debt and interest, although the old covenant is in effect extinguished as regards the mortgagor if he enters into a new covenant inconsistent with it². If the mortgagor has not created any subsequent incumbrance, the transfer may include a fresh demise with a new proviso for cesser. Where he has created a subsequent incumbrance, a new demise is not inserted and the transfer relies only on the original demise. If the mortgagor is not a party, the transfer is necessarily restricted to a transfer of the original covenant and mortgage term.

- 1 As to the statutory form see PARA 365.
- 2 *Bolton v Buckenham* [1891] 1 QB 278, CA. If the new covenant postpones the date of payment, a surety who does not concur is released: *Bolton v Buckenham* above; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1224. The production by the transferor's solicitor or licensed conveyancer of a deed of transfer with a receipt, in the body of the deed or indorsed on it, for the mortgage is a sufficient authority for payment to the solicitor or licensed conveyancer: see the Law of Property Act 1925 s 69; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 787. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 37; **SALE OF LAND** vol 42 (Reissue) PARA 315. In other cases the transferee must inquire as to the solicitor's authority: *Gordon v James* (1885) 30 ChD 249, CA.

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369. Transfer by indorsed receipt.

A mortgage may also be transferred by receipt indorsed on the mortgage stating by whom the money is paid¹. For the receipt to have this effect, the money must thereby appear to have been paid by a person who was not entitled to the immediate equity of redemption².

- 1 le a receipt under the Law of Property Act 1925 s 115: see PARA 645 et seq.
- 2 See the Law of Property Act 1925 s 115(2); and PARA 649.

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370. Collateral securities.

A transfer by deed of the mortgage or the benefit of it operates to convey collateral securities for the mortgage debt unless a contrary intention is expressed¹. If the mortgagee holds a negotiable instrument as collateral security and, after a transfer of the mortgage alone for full value, he indorses the instrument to a holder for value in good faith, the holder is able to recover on the instrument². Unless the transferor has agreed to hold the securities for the transferee he will, on being paid off in full by the transferee, hold them in trust for the mortgagor³.

- 1 See the Law of Property Act 1925 ss 114(1)(b), 205(1)(xxv).
- 2 *Glasscock v Balls* (1889) 24 QBD 13, CA.
- 3 See *Glasscock v Balls* (1889) 24 QBD 13 at 16, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/371. Mortgage to building society.

371. Mortgage to building society.

On the transfer of a building society mortgage the mortgagor should be a party, as it is doubtful whether the transferee can exercise the express power of sale which is usually contained in such a mortgage¹, for he is not in the same position as the society in regard generally to the exercise of the society's powers as mortgagee². The necessity for joining the mortgagor is avoided if the mortgage makes provision for transfer³. If, however, the loan is made by a mortgagee acting for purposes of his business to a consumer⁴, a term which gives the mortgagee the possibility of transferring his rights and obligations under the contract without the mortgagor's consent is presumed to be unfair where this may serve to reduce the guarantees⁵ for the mortgagor⁶. A transfer of a building society mortgage may be made to another society or a commercial company⁷, and the rights and powers of the transferor under the mortgage become vested in the transferee⁸.

- 1 *Re Rumney and Smith* [1897] 2 Ch 351, CA. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2019.
- 2 *Sun Permanent Benefit Building Society v Western Suburban and Harrow Road Permanent Building Society* [1921] 2 Ch 438 at 460, 467, CA. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2019.
- 3 *Sun Permanent Benefit Building Society v Western Suburban and Harrow Road Permanent Building Society* [1921] 2 Ch 438 at 460, 467, CA. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2019.

4 See generally PARAS 229-230.

5 Eg guarantees, if any, given by the rules of a building society. As to the rules of a building society see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1878 et seq.

6 See the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 para 1(p); and **CONTRACT** vol 9(1) (Reissue) PARA 794.

7 See the Building Societies Act 1986 ss 93, 94, 97; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1918 et seq, 2019.

8 See the Building Societies Act 1986 ss 93, 94, 97; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1918 et seq, 2019.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/372. Local authority mortgage.

372. Local authority mortgage.

A local authority¹ must not dispose of its interest as mortgagee of land² without the prior written consent of the mortgagor (or, if there is more than one mortgagor, all of them) specifying the name of the person to whom the interest is to be transferred³. A disposal made without this consent is void⁴. The Secretary of State, or, in relation to Wales, the Welsh Ministers⁵ may by regulations⁶:

- 34 (1) require a local authority to give to a mortgagor whose consent is sought such information as may be prescribed⁷;
- 35 (2) prescribe the form of the document by which a mortgagor's consent is given⁸;
- 36 (3) require a local authority making a disposal to secure that notice of the fact that the disposal has been made is given to the mortgagor⁹; and
- 37 (4) prescribe the form of that notice and the period within which it must be given¹⁰.

Consent given for these purposes may be withdrawn by notice in writing to the authority at any time before the disposal is made¹¹. It also ceases to have effect if the disposal is not made within six months after it is given¹². If consent is withdrawn or ceases to have effect the authority must return to the mortgagor any document in its possession by which he gave his consent¹³.

If consent has been given and the local authority certifies in the instrument effecting the disposal that it has not been withdrawn or ceased to have effect, the disposal is valid notwithstanding that consent has in fact been withdrawn or ceased to have effect¹⁴. In such a case, any person interested in the equity of redemption may, within six months of the disposal, by notice in writing served on the local authority, require the authority, the transferee and any person claiming under the transferee, to undo the disposal on such terms as may be agreed between them or determined by the court, and execute any documents and take any other steps necessary to vest back in the local authority the interest disposed of by it to the transferee¹⁵.

1 'Local authority' means (1) a county, district or London borough council; (2) the Common Council of the City of London; (3) a police authority established under the Police Act 1996 s 3 (see **POLICE** vol 36(1) (2007 Reissue) PARA 139 et seq); (4) the Metropolitan Police Authority (see **POLICE** vol 36(1) (2007 Reissue) PARA 147 et seq); (5) a joint authority established by the Local Government Act 1985 Pt IV (ss 23-42) (see **LOCAL**

GOVERNMENT vol 69 (2009) PARA 47); (6) the London Fire and Emergency Planning Authority (see **FIRE SERVICES** vol 18(2) (Reissue) PARA 17; **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 217); (7) the Council of the Isles of Scilly (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36); or (8) any other authority prescribed for these purposes by regulations made by the Secretary of State or, in relation to Wales, the Welsh Ministers; and includes any authority, board or committee which discharges functions which would otherwise fall to be discharged by two or more such authorities: Local Government Act 1986 s 9(1)(a) (amended by the Education Reform Act 1988 s 237, Sch 13 Pt I; Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt I para 30; Police Act 1996 s 103, Sch 7 para 1(2)(y); Police Act 1997 s 88, Sch 6 para 24; Greater London Authority Act 1999 ss 325, 328, Sch 27 para 55, Sch 29 Pt I para 46; Criminal Justice and Police Act 2001 ss 128(1), 137, Sch 6 Pt 2 para 42, Sch 7 Pt 5(1)); National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 paras 30, 32. Regulations under this provision must be made by statutory instrument which, in the case of regulations made by the Secretary of State, is subject to annulment in pursuance of a resolution of either House of Parliament: see the Local Government Act 1986 s 9(2). As to the procedure in relation to subordinate legislation made by the Welsh Ministers see the Government of Wales Act 2006 Sch 11 paras 33-35; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. At the date at which this volume states the law no such regulations had been made.

In any enactment, 'Secretary of State' means one of Her Majesty's principal secretaries of state: see the Interpretation Act 1978 s 5, Sch 1. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355. 'Welsh Ministers' means the First Minister and the Welsh Ministers appointed under the Government of Wales Act 2006 s 48: see s 45(2). As to the First Minister and the Welsh Ministers see the Government of Wales Act 2006 ss 46-48; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to devolved government in Wales generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. 'Wales' means the combined area of the counties which were created by the Local Government Act 1972 s 20 (as originally enacted) (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 5, 37), but subject to any alteration made under s 73 (consequential alteration of boundary following alteration of watercourse) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 90); Interpretation Act 1978 Sch 1 (definition substituted by the Local Government (Wales) Act 1994 s 1(3), Sch 2 PARA 9). As to local government areas and councils see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq; and as to boundary changes see **LOCAL GOVERNMENT** vol 69 (2009) PARA 54 et seq.

2 References to a local authority's interest as mortgagee of land include any interest of the authority in the land or in the debt secured; and references to the disposal of such an interest are to any transfer of the interest otherwise than by operation of law; and for these purposes the disposal of an interest in registered land must be taken to occur when the transfer is made and not when it is registered: Local Government Act 1986 s 9(1), (1)(b)-(c).

3 Local Government Act 1986 s 7(1). Section 7 applies to disposals on or after 24 July 1985 of a local authority's interest as mortgagee under a housing mortgage, and to disposals on or after 1 April 1986 of a local authority's interest as mortgagee under any description of mortgage, except in either case, where the disposal is carried out in pursuance of a contract entered into before that date: s 7(8).

4 Local Government Act 1986 s 7(3).

5 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; Government of Wales Act 2006 s 162(1), Sch 11 paras 30, 32.

6 Regulations under these provisions are made by statutory instrument which, in the case of regulations made by the Secretary of State, is subject to annulment in pursuance of a resolution of either House of Parliament: see the Local Government Act 1986 s 7(7). As to the regulations made see the Local Authorities (Disposal of Mortgages) Regulations 1986, SI 1986/1028.

7 Local Government Act 1986 s 7(6)(a). A local authority must give to a mortgagor whose consent is sought written information as to:

- 4 (1) the name and address of the intended transferee, and also, where the intended transferee is a company, the name and address of any holding company (Local Authorities (Disposal of Mortgages) Regulations 1986, SI 1986/1028, reg 3(1));
- 5 (2) the effect which the prospective disposal is likely to have on the rate of interest applicable to the mortgage, the way in which that rate is to be determined, and the places at which and the methods by which amounts payable under the mortgage may be paid (reg 3(2));
- 6 (3) the policy of the intended transferee with regard to mortgagors who are in arrears or default and a comparison of the policy of the local authority in relation to such matters (reg 3(3));
- 7 (4) the right of the mortgagor under the Local Government Act 1986 s 7(2)(a) (see the text and note 11) to withdraw his consent, the way in which consent may be withdrawn, and the fact

that, to be effective, notice of the withdrawal must be given before the disposal is made (Local Authorities (Disposal of Mortgages) Regulations 1986, SI 1986/1028, reg 3(4));

- 8 (5) the right of the mortgagor who does not wish to give his consent to the transfer of his mortgage to take no further action, and the fact that a mortgagor who takes no further action will not be treated as having given his consent to the transfer (reg 3(5)); and
- 9 (6) the right of the mortgagor (and others) under the Local Government Act 1986 s 7(5) (see the text to note 15) to require the local authority (and others) to undo a disposal and the steps to be taken by a mortgagor who wishes to exercise that right (Local Authorities (Disposal of Mortgages) Regulations 1986, SI 1986/1028, reg 3(6)).

'Intended transferee' means the person to whom a local authority intends to dispose of its interest as mortgagee of any land: reg 2. 'Prospective disposal' means the prospective disposal by a local authority to the intended transferee: reg 2.

8 Local Government Act 1986 s 7(6)(b). As to the form for consent see the Local Authorities (Disposal of Mortgages) Regulations 1986, SI 1986/1028, reg 4, Schedule.

9 Local Government Act 1986 s 7(6)(c).

10 Local Government Act 1986 s 7(6)(d). This notice is to be given to the mortgagor no later than seven days after the date of the disposal: see the Local Authorities (Disposal of Mortgages) Regulations 1986, SI 1986/1028, reg 5.

11 Local Government Act 1986 s 7(2)(a).

12 Local Government Act 1986 s 7(2)(b).

13 Local Government Act 1986 s 7(2).

14 Local Government Act 1986 s 7(4).

15 Local Government Act 1986 s 7(5).

UPDATE

372 Local authority mortgage

NOTE 1--Definition of 'local authority' in Local Government Act 1986 s 9(1)(a) further amended: Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 71.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/373. Mortgage to trustees.

373. Mortgage to trustees.

On a mortgage to trustees it is the practice not to disclose the trust, and when a transfer is made to new trustees it is sufficient to recite that they have become entitled in equity to the mortgage debt and securities on a joint account¹. This justifies the transfer to them and the trust will still be kept off the title², and, as a person dealing in good faith with a mortgagee is not concerned with any trust at any time affecting the mortgage money or its income³, the inconvenient consequences of accidental disclosure of trust are avoided⁴.

1 See PARA 181.

2 See *Re Harman and Uxbridge and Rickmansworth Rly Co* (1883) 24 ChD 720; *Carritt v Real and Personal Advance Co* (1889) 42 ChD 263 at 272; *Re Blaiberg and Abrahams* [1899] 2 Ch 340.

3 See the Law of Property Act 1925 s 113(1). This provision is expressed to apply also to a person dealing in good faith with the mortgagor if the mortgage has been discharged, released or postponed as to the whole or any part of the mortgaged property, and to apply whether or not the person in question has notice of the trust: see s 113(1). Unless the contrary is expressly stated in the instruments relating to the mortgage, the person dealing with the mortgagee or mortgagor may assume: (1) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account (s 113(1)(a)); and (2) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and its income (including any arrears of interest) and to release or postpone the priority of the mortgage debt or any part of it or to deal with the same or the mortgaged property or any part of it (s 113(1)(b)), without in either case investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference to it (s 113(1)). These provisions apply to mortgages whenever made, but only as respects dealings on or after 1 January 1926: s 113(2). They do not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust: s 113(3). As to the meanings of 'mortgagor' and 'mortgagee' see PARA 104 note 1. As to the meaning of 'mortgage' see PARA 101 note 4.

4 *Re Blaiberg and Abrahams* [1899] 2 Ch 340.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/374. Statutory transfer.

374. Statutory transfer.

A charge by way of legal mortgage of freehold or leasehold land made by statutory legal charge¹ may be transferred by deed expressed to be made by way of statutory transfer in such one of certain statutory forms as may be appropriate with such variations and additions, if any, as the circumstances may require². A deed of statutory transfer purports to convey and transfer to the transferee the benefit of the mortgage³, and the effect is to vest in the transferee⁴:

- 38 (1) the right to demand, sue for and recover and give receipts for the mortgage debt, or the unpaid part of it, and interest, and the benefit of all securities for the same, and the benefit of and right to sue on the covenants with, and to exercise all the powers of, the mortgagee⁵; and
- 39 (2) all the mortgagee's term and interest in the mortgaged land, subject to redemption⁶.

If a covenantor (normally a surety) joins in the statutory transfer, there will be implied a covenant by him to pay the principal and interest⁷. In all other cases the covenant must be expressed; the covenant for payment on a certain day by implication prevents the covenantor suing before that day⁸. If the transfer is in the form of a statutory transfer and mortgage combined⁹, it operates also as a statutory mortgage¹⁰.

1 See PARA 191.

2 See the Law of Property Act 1925 s 118(1). For a statutory form of transfer which is not confined to statutory legal charges see PARA 365.

3 See the Law of Property Act 1925 s 118(2)(i), Sch 4 Form 2 (mortgagor not joining), Form 3 (covenantor joining), Form 4 (statutory transfer and mortgage combined). See also note 6. As to the meaning of 'mortgage' see PARA 101 note 4.

4 This includes his personal representatives and assigns: see the Law of Property Act 1925 s 118(2)(i). See also note 6.

5 See the Law of Property Act 1925 s 118(2)(i). See also note 6. As to the meaning of 'mortgagee' see PARA 104 note 1.

6 See the Law of Property Act 1925 s 118(2)(ii). The words 'benefit of the mortgage' now have statutory effect in all mortgages (see PARA 365), and the transfer would operate under the Law of Property Act 1925 s 117 (see PARA 192): cf the Conveyancing Act 1881 s 27(2)(ii) (repealed); and *Re Beachey, Heaton v Beachey* [1904] 1 Ch 67, CA.

7 See the Law of Property Act 1925 s 118(3).

8 See *Bolton v Buckenham* [1891] 1 QB 278 at 281, CA, per Lord Esher MR.

9 See the Law of Property Act 1925 Sch 4 Form 4.

10 See the Law of Property Act 1925 s 118(4).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/375. Transfer of registered charge.

375. Transfer of registered charge.

A registered charge of registered land must be transferred in the prescribed form and completed by entry on the register of the name of the new proprietor¹.

¹ See the Land Registration Act 2002 s 27, Sch 2 para 10; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 927.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/376. Transfer of statutory mortgage of ship or aircraft.

376. Transfer of statutory mortgage of ship or aircraft.

A registered mortgage of a ship or share in a ship may be transferred by an instrument made in the form prescribed by or approved under registration regulations¹.

There is no special form of transfer of mortgage of an aircraft or hovercraft².

¹ See the Merchant Shipping Act 1995 s 16, Sch 1 paras 11, 12; the Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138, reg 60; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 323 et seq. As to mortgages of ships see PARA 246.

² The Bills of Sale Acts 1878 and 1882 do not apply to registered mortgages of aircraft made on or after 1 October 1972: see the Mortgaging of Aircraft Order 1972, SI 1972/1268, arts 2(2), 16(1); and **AIR LAW** vol 2 (2008) PARA 431. As to mortgages of aircraft and hovercraft see PARA 248.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/377. Transfer of bill of sale.

377. Transfer of bill of sale.

A registered bill of sale can be transferred so as to constitute a valid security in the transferee's favour¹; but if the bill of sale is unregistered, the transfer, in order to create an effective security, requires the same formalities as an original bill of sale².

1 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1672, 1832-1833. The provisions of the Law of Property Act 1925 s 114 do not apply to a transfer of a bill of sale of chattels by way of security: see s 114(5); and PARA 365. As to mortgages of personal chattels see PARA 231.

2 *Jarvis v Jarvis* (1893) 63 LJCh 10.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/378. Transfer for less than mortgage debt.

378. Transfer for less than mortgage debt.

The value of the mortgage debt to the transferee depends on the soundness of the security, and he may purchase the debt and security at less than the nominal amount of the debt; but, notwithstanding that he has done so, he is entitled to recover the whole amount due at the time of the transfer¹ unless he stands in a position which would make this inequitable². The rule applies not only in favour of a stranger who purchases the mortgage debt³, but also in favour of a creditor⁴ or subsequent incumbrancer⁵, or any other person interested in the estate, such as a reversioner, provided that he did not create the charge⁶; and it applies both against the mortgagor⁷ and his personal representatives⁸ and against a purchaser of, or incumbrancer on, the equity of redemption⁹. If a vendor is bound to clear the property of incumbrances and the purchaser buys them up, he can only recover against the vendor the amount actually paid by him¹⁰. A trustee of the mortgaged property¹¹, or the mortgagor's agent¹², or the mortgagor's personal representatives¹³ are not, however, allowed to hold the mortgage as a security for more than they gave for it. The disability applies to a solicitor¹⁴ or other person standing in a relation to the mortgagor giving special opportunities of buying up the mortgage¹⁵, and it applies after the agency or other confidential employment has ceased if the purchase of the mortgage is due to knowledge obtained during such an employment¹⁶. A surety is subject to the same rule as an agent¹⁷. Moreover, where the transferee of an invalid security has only an equitable right to enforce it, so that relief is given to him on equitable terms, he can recover no more than the sum which he has actually advanced¹⁸.

1 *Anon* (1707) 1 Salk 155; *Davis v Barrett* (1851) 14 Beav 542 at 554.

2 See also PARA 380.

3 *Phillips v Vaughan* (1685) 1 Vern 336; *Davis v Barrett* (1851) 14 Beav 542.

4 *Morret v Paske* (1740) 2 Atk 52 at 54.

5 *Darcy v Hall* (1682) 1 Vern 49; *Dobson v Land* (1850) 8 Hare 216 at 220; *Shaw v Bunny* (1865) 2 De GJ & Sm 468 at 472.

6 *Davis v Barrett* (1851) 14 Beav 542.

7 *Dobson v Land* (1850) 8 Hare 216; *Shaw v Bunny* (1865) 2 De GJ & Sm 468.

8 As to the devolution of mortgage estates on personal representatives see PARA 387; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 440 et seq.

9 *Davis v Barrett* (1851) 14 Beav 542. Originally the purchaser of the mortgage was only allowed to hold it for the amount of his purchase money against a purchaser or subsequent incumbrancer: *Long v Clopton* (1687) 1 Vern 464; *Williams v Springfeild* (1687) 1 Vern 476.

10 *Cane v Lord Allen* (1814) 2 Dow 289 at 296, HL.

11 *Darcy v Hall* (1682) 1 Vern 49; *Anon* (1707) 1 Salk 155; *Morret v Paske* (1740) 2 Atk 52; *Dobson v Land* (1850) 8 Hare 216; *Re Imperial Land Co of Marseilles, ex p Larking* (1877) 4 ChD 566, CA.

12 *Morret v Paske* (1740) 2 Atk 52; *Reed v Norris* (1837) 2 My & Cr 361 at 374; *Lawless v Mansfield* (1841) 1 Dr & War 557 at 629.

13 The rule stated in the text formerly applied to the heir: *Darcy v Hall* (1682) 1 Vern 49; *Morret v Paske* (1740) 2 Atk 52 at 53; *Lancaster v Evors* (1844) 1 Ph 349 at 354; *Lancaster v Evors* (1846) 10 Beav 154 at 165. Apparently a tenant for life who buys up an incumbrance on the inheritance can hold it only for what he has paid: *Hill v Browne* (1844) Drury temp Sug 426. Under special circumstances, however, an heir was allowed to recover the full debt: *Darcy v Hall* above.

14 *Nelson v Booth* (1857) 27 LJCh 110; *Macleod v Jones* (1883) 24 ChD 289 at 300, 303, CA.

15 *Hobday v Peters* (1860) 28 Beav 349 at 351.

16 *Carter v Palmer* (1842) 8 Cl & Fin 657 at 705, HL. See also **AGENCY** vol 1 (2008) PARA 91.

17 *Reed v Norris* (1837) 2 My & Cr 361. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1160. As to suretyship see PARA 146 et seq.

18 *Re Romford Canal Co, Pocock's Claim, Trickett's Claim, Carew's Claim* (1883) 24 ChD 85 at 93.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/379. Effect of transfer on arrears of rent or interest.

379. Effect of transfer on arrears of rent or interest.

The conveyance to the transferee operates in the same manner as an ordinary conveyance of land, and gives the transferee a title to rents in arrear at the date of the transfer¹. Where interest is in arrear at the date of transfer and the mortgagor does not concur, the transferee, on paying the arrears to the transferor, cannot treat them as principal so as to carry future interest². The mortgagee and the persons claiming under him cannot, without the mortgagor's privity, add to what is due or turn interest into principal³. Where a trustee of a mortgaged estate agrees, in excess of his powers, to allow a transferee to capitalise arrears of interest, this will not prejudice the transferee's right to claim the interest as such⁴.

1 See PARA 346.

2 *Ashenhurst v James* (1745) 3 Atk 270. See also PARA 738.

3 *Matthews v Wallwyn* (1798) 4 Ves 118 at 128; *Halifax Mortgage Services Ltd v Muirhead* (1997) 76 P & CR 418, [1997] NPC 171, CA.

4 *Cottrell v Finney* (1874) 9 Ch App 541 at 549.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/380. Transfer subject to outstanding equities.

380. Transfer subject to outstanding equities.

So far as the security consists of the mortgage debt, it is a chose or thing in action, and is only assignable in accordance with the rule that a transferee of a chose in action takes it subject to any equities and rights of set-off existing between the debtor and the transferor¹. As the mortgage of the property is incident to the debt, the same rule extends to this portion of the security, and the transferee can only hold the property as security for repayment of the amount properly due from the mortgagor to the mortgagee at the date of assignment, allowing for any claims which the mortgagor may on his side have against the mortgagee and which are part of the mortgage transaction². Where a security given by a company is invalid, a transferee who takes after a winding up order cannot maintain it against the liquidator, even if he could have done so against the company³.

1 *Cockell v Taylor* (1851) 15 Beav 103 at 117; *Smith v Parkes* (1852) 16 Beav 115 at 119; *Roxburghe v Cox* (1881) 17 ChD 520, CA. As to equitable set-off see *Dodd v Lydall* (1841) 1 Hare 333; *Re Poulter, Poulter v Poulter* (1912) 56 Sol Jo 291; *Parker v Jackson* [1936] 2 All ER 281; and **CHOSSES IN ACTION** vol 13 (2009) PARAS 60-67; **CIVIL PROCEDURE** vol 11 (2009) PARA 658 et seq; **EQUITY** vol 16(2) (Reissue) PARAS 901-905. Originally the debt was only assignable in equity; the assignee had to sue in the assignor's name, and was therefore liable to be met by any defence or right of set-off available for the mortgagor against the assignor; thus the assignee of a chose in action was not in the position of a purchaser of real estate who took the legal estate for value without notice (*Cockell v Taylor* (1851) 15 Beav 103); and although by statute the debt can now be assigned at law, the statute expressly makes the assignment subject to equities which would, apart from the statute, have priority over the assignee's right (see the Law of Property Act 1925 s 136(1); and **CHOSSES IN ACTION** vol 13 (2009) PARA 72). See also *Re Milan Tramways Co, ex p Theys* (1882) 22 ChD 122 at 127; affd (1884) 25 ChD 587, CA. It has been held, by Bacon V-C, that, where the mortgagor's equity was to set aside the mortgage, a transferee for value had a better equity and was entitled to his security (see *Judd v Green* (1875) 45 LJCh 108; *Nant-y-glo and Blaina Ironworks Co Ltd v Tamplin* (1876) 35 LT 125), but this is opposed to the general principle and is doubtful.

2 *Norrish v Marshall* (1821) 5 Madd 475; *De Lisle v Union Bank of Scotland* [1914] 1 Ch 22, CA; *Halifax Mortgage Services Ltd v Muirhead* (1997) 76 P & CR 418, [1997] NPC 171, CA.

3 *Re Gwelo, Matabeleland, Exploration and Development Co, Williamson's Claim* [1901] 1 IR 38, CA. See further **EQUITY** vol 16(2) (Reissue) PARAS 642-645.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/381. Amount originally advanced.

381. Amount originally advanced.

The effect of a receipt for money is considered generally elsewhere in this work¹. As regards the amount originally advanced on a mortgage, the mortgagor's receipt contained in or indorsed on the mortgage deed is sufficient evidence of the advance in favour of a transferee of the mortgage for value who has no notice that the money was not advanced², even if no money has in fact been advanced³. If, however, the mortgage was created in circumstances which call for inquiry, the transferee is bound, if he has notice of those circumstances⁴, to inquire whether the advance was made, and cannot recover more than the actual advance⁵ unless there are special circumstances depriving the mortgagor of the benefit of this exception, as where a client has handed the mortgage deed containing the receipt to his solicitor for the purpose of enabling the money to be raised by the solicitor, in which case the client is estopped, as against a sub-mortgagee, from saying that the original amount was not advanced⁶.

1 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 224.

2 See the Law of Property Act 1925 ss 68, 205(1)(xxi).

3 *French v Hope* (1887) 56 LJCh 363. See also *Bickerton v Walker* (1885) 31 ChD 151, CA (overruling *Parker v Clarke* (1861) 30 Beav 54).

4 *Bateman v Hunt* [1904] 2 KB 530, CA.

5 See *Gresley v Mousley* (1862) 3 De GF & J 433; *Saunders v Kent* [1885] WN 147.

6 *Powell v Browne* (1907) 97 LT 854, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/382. Dealings with mortgage debt prior to transfer.

382. Dealings with mortgage debt prior to transfer.

As regards dealings with the mortgage debt subsequent to the creation of the mortgage, the rule that the transfer is subject to outstanding equities¹ applies, and the transferee of the mortgage takes it, when the mortgagor is not party to the transfer, subject to the state of accounts then subsisting between the mortgagor and mortgagee². He must at his peril inquire what is due on the mortgage, and, if all or part of the principal has been paid off by the mortgagor or has been discharged by receipt of rents and profits, the transferee, although he takes without notice, cannot set up again the whole debt against the mortgagor³. Further, whatever the mortgagor can claim by way of set-off or mutual credit against the mortgagee, he can equally claim against the transferee⁴. Hence, for the protection of the transferee, it is proper either to make the mortgagor a party to the transfer or to obtain a written admission from him that the sum claimed by the transferor is really due⁵.

1 See PARA 380.

2 *Chambers v Goldwin* (1804) 9 Ves 254 at 264. See also **CHOSSES IN ACTION** vol 13 (2009) PARA 62.

3 *Bradwell v Catchpole* (1700) 3 Swan 78n. As to payment of all the money so that the debt is non-existent see *Turner v Smith* [1901] 1 Ch 213; *Parker v Jackson* [1936] 2 All ER 281 at 288. See also the cases cited in PARA 383 notes 1-3.

4 *Norrish v Marshall* (1821) 5 Madd 475 at 481.

5 See *Matthews v Wallwyn* (1798) 4 Ves 118 at 127.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/7. ESTATE AND INTEREST OF THE MORTGAGEE/(2) ASSIGNMENT AND DEVOLUTION/(i) Transfer of Mortgage/383. Payment of mortgage debt without notice of transfer.

383. Payment of mortgage debt without notice of transfer.

The mortgagor is entitled to make payments to the mortgagee, whether of principal or interest, and to have credit for them as against the transferee after the transfer until he has received notice of it¹. The notice, which may be actual or constructive², stops the mortgagor's right of set-off in respect of matters arising subsequently³. The mortgagor is not, by reason of omitting to call for production of the mortgage deed on payment of part of the principal⁴, or even on payment of the whole⁵, guilty of such negligence as to be postponed to the transferee, the

transferee being on his side guilty of negligence in not having given notice of the assignment. A mortgagor executing a new mortgage may be debarred from claiming credit for money realised under an old mortgage which he has allowed to remain outstanding⁶. A payment, to be good against the transferee, need not be made in money; it may be made in any manner which is equivalent to payment, for instance by delivery of goods⁷, or by a release founded on any fair and genuine arrangement⁸; and it is sufficient if, on a balance of account between the mortgagor and mortgagee, there is a sum in the mortgagor's favour sufficient to satisfy the debt⁹, provided that the balance has been appropriated to the debt before notice of the assignment¹⁰. The payment must, however, be made to the mortgagee or to a person authorised to receive it on his behalf¹¹.

1 *Bickerton v Walker* (1885) 31 ChD 151 at 158, CA; *Dixon v Winch* [1900] 1 Ch 736 at 742, CA; *Williams v Sorrell* (1799) 4 Ves 389; *Re Frazer, ex p Monro* (1819) Buck 300 at 303; *Stocks v Dobson* (1853) 4 De GM & G 11; *Wheatley v Bastow* (1855) 7 De GM & G 261 at 275; *Reeve v Whitmore* (1863) 4 De GJ & Sm 1 at 19; *Re Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 ChD 178 at 186; *Berwick & Co v Price* [1905] 1 Ch 632 at 643.

2 *Dixon v Winch* [1900] 1 Ch 736, CA, where the mortgagee was the mortgagor's solicitor, and the mortgagor left the dealings with the property in his hands. Hence, on a transfer of the mortgage the mortgagor had constructive notice of it, and when, on a subsequent sale, the solicitor, with the mortgagor's consent, retained the mortgage money out of the purchase money, this was not a payment by the mortgagor without notice of the transfer so as to discharge the mortgage in favour of the purchaser as against the transferee. As to the doctrine of notice see **EQUITY** vol 16(2) (Reissue) PARA 576 et seq.

3 *Cavendish v Geaves* (1857) 24 Beav 163; and see **CIVIL PROCEDURE** vol 11 (2009) PARA 686. Cf *Re Poulter, Poulter v Poulter* (1912) 56 Sol Jo 291.

4 *Stocks v Dobson* (1853) 4 De GM & G 11 at 17; *Berwick & Co v Price* [1905] 1 Ch 632 at 644.

5 *Norrish v Marshall* (1821) 5 Madd 475; *Re Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 ChD 178. The principle of these decisions was doubted in *Dixon v Winch* [1900] 1 Ch 736 at 743, CA, per Cozens-Hardy J.

6 *Re Ambrose's Estate* [1913] 1 IR 506; affd [1914] 1 IR 123.

7 *Norrish v Marshall* (1821) 5 Madd 475.

8 *Stocks v Dobson* (1853) 4 De GM & G 11 at 16.

9 *Norrish v Marshall* (1821) 5 Madd 475.

10 *Rayne v Baker* (1859) 1 Giff 241.

11 *Withington v Tate* (1869) 4 Ch App 288.

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384. Subrogated rights of person paying off mortgage debt.

Subrogation is an equitable remedy to reverse or prevent unjust enrichment¹. The remedy is available if:

- 40 (1) the defendant has been enriched at the claimant's expense²;
- 41 (2) such enrichment was unjust³; and
- 42 (3) there are no policy reasons for denying a remedy⁴.

A lender who advances money which is used to discharge a security will therefore normally be subrogated to the rights under that security⁵ against a borrower and subsequent incumbrancers⁶ even though there has been no actual transfer of the security. Frequently in such cases it is intended that the lender will be given a new security, but that security proves to be void or voidable⁷. However, subrogation does not depend on intention, whether common or unilateral, although evidence of an intention that the claimant should be unsecured may prevent the claimant obtaining subrogation to any security⁸. Partial discharge of an earlier security is sufficient to give the lender the benefit of that security as against the defendant, while the holder of an earlier security retains priority over the claimant⁹. The claimant does not need to show that the defendant was at fault. The remedy will not be denied on the ground that the claimant failed to take reasonable steps to protect his position¹⁰. Thus the claimant may be subrogated to the rights under the security discharged with his funds even though he has actually taken a mortgage of part of the property, as the remedy given by this later mortgage is not co-extensive with that given by the earlier. In such a case there is no merger of the mortgage in the charge¹¹.

A lender who advances money which is used to discharge an unsecured loan is also, on the above principles, normally subrogated to the rights of the creditor¹².

A lender who advances funds to provide the whole or part of the purchase price of a property may, on the above principles, be subrogated to the vendor's lien over the property¹³ and a subsequent lender who pays off such a loan is subrogated to the vendor's lien¹⁴. The creator of a charge will not be treated as an assignee against his own subsequent incumbrances¹⁵, and in a case where a purchase is on the terms that the debts due to the purchaser and other mortgagees are to be paid off, the purchaser's own debt is extinguished¹⁶.

However, where two properties are comprised in the same mortgage and the person entitled to the equity of redemption in one pays off the mortgage and takes a reconveyance of both properties, he will be treated as an assignee of the mortgage, at any rate in part, on the other property, notwithstanding that he may not be able to keep it alive on the first-mentioned property against subsequent incumbrancers¹⁷.

1 As to the effect of subrogation see PARA 385. As to subrogation generally see **EQUITY** vol 16(2) (Reissue) PARAS 770-775. As to the general principles of restitution and defences to claims based on unjust enrichment see **CONTRACT** vol 9(1) (Reissue) PARAS 1092-1093.

2 A defendant is enriched if his financial position is materially improved: see *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759, [2004] NPC 98.

3 The enrichment is unjust if the lender does not get the security he bargained for: see *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759, [2004] NPC 98.

4 See *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL; *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291, [2004] 13 EG 127 (CS).

5 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. See also *Chetwynd v Allen* [1899] 1 Ch 353; *Butler v Rice* [1910] 2 Ch 277; *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 2 All ER 865, PC; *Orakpo v Manson Investments Ltd* [1978] AC 95, [1977] 3 All ER 1, HL; *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR 328, CA.

6 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. See also *Whiteley v Delaney* [1914] AC 132, HL; *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 2 All ER 865, PC.

7 *Butler v Rice* [1910] 2 Ch 277; *Cheltenham and Gloucester plc v Appleyard* [2004] EWCA Civ 291, [2004] 13 EG 127 (CS). See also *Whiteley v Delaney* [1914] AC 132, HL; *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 2 All ER 865, PC. An equitable chargee of a policy who pays the premiums and interest on them can add these to his charge with interest on the sum so paid: *Re City of Glasgow Life Assurance Co, Clare's Policy* (1914) 84 LJCh 684; and see PARA 684. See also *Halifax Mortgage Services Ltd v Muirhead* (1997) 76 P & CR 418, [1997] NPC 171, CA.

8 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. See also *Paul v Speirway Ltd* [1976] Ch 220, [1976] 2 All ER 587; *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR 328, CA; *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759, [2004] NPC 98. Thus a lender may be subrogated to the rights of a prior mortgagee over jointly owned property even if one of the co-owners was unaware of the discharge: *National Guardian Mortgage Corp v Roberts* [1993] NPC 149, CA.

9 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. See also *Chetwynd v Allen* [1899] 1 Ch 353.

10 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. See also *Chetwynd v Allen* [1899] 1 Ch 353.

11 *Chetwynd v Allen* [1899] 1 Ch 353. See also *Bell v Banks* (1841) 3 Man & G 258.

12 *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759, [2004] NPC 98.

13 *Boodle Hatfield & Co v British Films Ltd* [1986] FLR 134, 2 BCC 99, 221. As to the vendor's lien see **LIEN** vol 68 (2008) PARA 859.

14 *UCB Bank plc v Hedworth* [2003] EWCA Civ 1717, [2002] 3 EGLR 76, [2002] 46 EG 200.

15 See PARA 673. Cf *Mackenzie v Gordon* (1839) 6 Cl & Fin 875 at 883, HL. The trustee in bankruptcy of the mortgagor, who acquires a charge on the estate, is, however, entitled to hold the charge for the benefit of creditors: *Squire v Ford* (1851) 9 Hare 47 at 60; *Adams v Angell* (1876) 5 ChD 634 at 647, CA; *Cracknall v Janson* (1877) 6 ChD 735; *Bell v Sunderland Building Society* (1883) 24 ChD 618.

16 *Brown v Stead* (1832) 5 Sim 535; but see *Squire v Ford* (1851) 9 Hare 47.

17 *Taws v Knowles* [1891] 2 QB 564 at 572, CA; *Re City of Glasgow Life Assurance Co, Clare's Policy* (1914) 84 LJCh 684. See also PARAS 673, 683.

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385. Effect of subrogation.

The effect of subrogation to a security is that the relations between the claimant and a defendant who would otherwise be unjustly enriched are regulated as if the benefit of the security had been assigned to him¹. The claimant is not to be treated as an assignee in relation to someone who would not be unjustly enriched².

A claimant is entitled to enforce the subrogated security to recover payment of the secured debt which was discharged together with interest at the rate, compounded if appropriate, which would have been payable under it³ up to the rate which the claimant agreed to accept⁴. The court should not make an order for possession without determining what sums would have been due under the subrogated security. This may require consideration of what repayments by the borrower should be attributed to the subrogated security, and the effect of subsequent events such as an agreement to extend time for repayments or a variation of the amount of repayments⁵.

A secured creditor whose debt has been repaid by another owes a duty to the payer not to destroy or prejudice any right or remedy the payer may have by way of subrogation and is liable to pay damages for any loss caused to the payer as a result of a breach of that duty⁶.

1 As to subrogation see PARA 384.

2 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. See also PARA 684.

3 *Western Trust Savings Ltd v Rock* [1993] NPC 89, CA.

4 *Halifax Mortgage Services Ltd v Muirhead* [1997] NPC 171, 76 P & CR 418, CA. See also *Kali Ltd v Chawla; Advani v Chawla* [2007] EWHC 2357 (Ch), [2008] BPIR 415, [2007] All ER (D) 90 (Sep).

5 *Halifax Mortgage Services Ltd v Muirhead* [1997] NPC 171, 76 P & CR 418, CA.

6 *Faircharm Investments Ltd v Citibank International plc* (1998) Times, 20 February, CA.

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386. Securitisation of mortgages.

Securitisation is the sale of a package of mortgage debts to a corporate vehicle (the 'issuer') established for the purpose of issuing securities usually in bearer form such as bonds. One or more mortgagees (the 'originator') may agree to sell debts and related security to the issuer. This effects an equitable assignment of the mortgages which is not perfected by notice to the mortgagors or by registration. The issuer is entitled to call for a legal transfer of legal title to the mortgages in certain circumstances such as the persistent default or insolvency of the originator. The issuer is given an irrevocable power of attorney to effect the transfer and for certain other purposes¹. The originator retains the powers of the mortgagee, including the right to possession² but agrees to act in accordance with the instructions of the issuer in relation to matters such as interest rates and enforcement. The undertaking and assets of the issuer, including the mortgages, are in turn charged in favour of a security trustee for the benefit of the holders of notes or bonds issued by the issuer³. The security trustee is given custody of the charge certificates or, in the case of unregistered land, mortgages and title deeds, and is given an irrevocable power of attorney to effect a legal transfer of the mortgages⁴.

1 See the Powers of Attorney Act 1971 s 4; and **AGENCY** vol 1 (2008) PARA 175.

2 See *Paragon Finance plc v Pender* [2005] EWCA Civ 760, [2005] All ER (D) 307 (Jun).

3 The charge takes effect as an equitable sub-charge. As to equitable charges see PARAS 106, 118 et seq, 139 et seq.

4 As to transfer of mortgages see PARA 364 et seq.

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(ii) Devolution on Death

387. Devolution of mortgagee's estate or interest.

It has long been settled that a mortgage security is personal estate, as the mortgagee's principal right is to the money, and his right to the land is only security for the money¹. On the mortgagee's death leaving a will, both the mortgage debt and the mortgagee's estate or interest in the mortgaged property, whether it is of freehold tenure or consists of leaseholds or

other personal property, vest, in the first instance, in the executors, notwithstanding any disposition in the will, and the executors can exercise the mortgagee's powers under the mortgage². Hence, provided that the executors have not assented to any bequest of the mortgage, they hold the legal estate in freehold mortgaged property, and can reconvey or transfer or, if they exercise the power of sale, convey.

The personal representatives for the time being are to be deemed in law the mortgagee's heirs and assigns within the meaning of all trusts and powers³. Further, by virtue of the definition of 'mortgagee' as including any person from time to time deriving title under the original mortgagee⁴, personal representatives can exercise the mortgagee's statutory powers⁵. The devolution of a mortgage on land is governed by the law of the place where it is situated⁶.

1 *Thornborough v Baker* (1675) 3 Swan 628 at 630; *Canning v Hicks* (1686) 1 Vern 412; *Tabor v Grover* (1699) 2 Vern 367; and see *Winn v Littleton* (1681) 1 Vern 3 at 4 note (1). See also **EQUITY** vol 16(2) (Reissue) PARA 605. Formerly the mortgaged property, if it was real estate, might devolve on one person, while the mortgage debt devolved on another, in which case he who took the mortgaged estate by devise or by descent was a trustee for the person entitled to the mortgage debt: *A-G v Meyrick* (1750) 2 Ves Sen 44 at 46.

2 Personal estate (including leaseholds) vests in the personal representatives at common law, and real estate (including leaseholds and mortgage estates) vests in them by virtue of the Administration of Estates Act 1925 ss 1(1), 3(1): see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 371-373.

3 Administration of Estates Act 1925 s 1(2). Thus personal representatives can exercise all express powers conferred in a mortgage made before 1926 on the mortgagee, his heirs and assigns.

4 See the Law of Property Act 1925 s 205(1)(xvi); and PARA 104 note 1.

5 As to the mortgagee's statutory powers see eg PARA 443 et seq.

6 *Re Hoyles, Row v Jagg* [1911] 1 Ch 179, CA; cf *Haque v Haque (No 2)* (1965) 114 CLR 98, Aust HC. This does not, apparently, apply for revenue purposes: see *Lawson v IRC* [1896] 2 IR 418; *Re Hoyles, Row v Jagg* at 182 per Farwell LJ. See also *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, CA. As to the circumstances rendering it necessary to consider the division of property into movables and immovables see *Re Hoyles, Row v Jagg* above at 185 per Farwell LJ. See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 381, 387; **INHERITANCE TAXATION** vol 24 (Reissue) PARA 602.

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388. Effect of specific bequest of mortgage.

A specific bequest of the mortgage entitles the legatee both to the mortgage debt and to the mortgaged property, subject to the executors' assent¹. Upon this assent being given, the legal title to the debt and all the mortgagee's interest in the mortgaged property, legal or otherwise, vests in the legatee². Where a testator has by his will devised or bequeathed property and sells it during his lifetime, leaving part of the purchase money on mortgage, the mortgage does not pass to the devisee or legatee of the property³. Mortgages can be bequeathed for charitable purposes⁴.

1 *Martin d Weston v Mowlin* (1760) 2 Burr 969 at 978; *Renvoize v Cooper* (1822) 6 Madd 371; *Mather v Thomas* (1833) 10 Bing 44; *Doe d Guest v Bennett* (1851) 6 Exch 892.

2 It is, however, better for the executors to transfer the mortgage to the legatee by short deed of transfer. As to assents see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 559 et seq.

3 *Moor v Raisbeck* (1841) 12 Sim 123; *Farrar v Lord Winterton* (1842) 5 Beav 1; *Re Clowes* [1893] 1 Ch 214, CA; *Re Richards, Jones v Rebbeck* (1921) 90 LJCh 298.

4 This could not be done before the enactment of the Mortmain and Charitable Uses Act 1891 s 3 (repealed): see **CHARITIES** vol 8 (2010) PARAS 82-83. See also *Re Hoyles, Row v Jagg* [1911] 1 Ch 179, CA.

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389. Circumstances causing property to devolve as realty.

So long as the equity of redemption¹ is not released or foreclosed or extinguished by lapse of time, the mortgagee's interest continues to be personal estate, notwithstanding that he may have entered into possession², and will not pass under a general devise of real estate³ unless such an intention is shown⁴ or where there is no other estate or interest to which the description can refer⁵. If, in addition to his mortgage interest, the mortgagee has an estate in the property, a specific devise of the property will pass his proprietary estate only and not his interest as mortgagee. Thus, if he is mortgagee of a term and also reversioner, a specific devise does not carry the mortgage, notwithstanding that the term has at law merged in the reversion⁶. If, however, he has entered into possession, a specific devise of the property will pass all his interest and will consequently include the mortgage debt⁷.

If, at the time of the mortgagee's death, the equity of redemption is already extinguished, the property is real estate in his hands and devolves as such⁸. If in his will he disposes of the property as though his interest were still that of mortgagee only, the property none the less passes under the disposition⁹.

1 As to the equity of redemption see PARA 302 et seq.

2 *Noy v Ellis* (1677) 2 Cas in Ch 220; *Re Loveridge, Drayton v Loveridge* [1902] 2 Ch 859.

3 *Strode v Russel* (1707) 2 Vern 621; *Casborne v Scarfe* (1738) 1 Atk 603; *Bowen v Barlow* (1872) 8 Ch App 171; *Davy v Redington* [1917] 1 IR 250, Ir CA.

4 *Mackesy v Mackesy* [1896] 1 IR 511; *Kilkelly v Powell* [1897] 1 IR 457.

5 *Re Lowman, Devenish v Pester* [1895] 2 Ch 348, CA.

6 *Bowen v Barlow* (1872) 8 Ch App 171.

7 *Woodhouse v Meredith* (1816) 1 Mer 450; *Re Carter, Dodds v Pearson* [1900] 1 Ch 801.

8 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 363 et seq. As to extinguishment of title by lapse of time see **LIMITATION PERIODS** vol 68 (2008) PARA 1105 et seq.

9 *Silberschildt v Schiott* (1814) 3 Ves & B 45, where the equity of redemption had been extinguished by foreclosure.

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390. Registered land.

On the death of a sole proprietor or the survivor of two or more proprietors of a registered charge on registered land, his personal representatives are entitled to be registered in his place¹. They have power to transfer the registered charge without themselves being registered².

1 See the Land Registration Rules 2003, SI 2003/1417, r 163; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 921. Cf the position on bankruptcy of the proprietor see rr 165-170; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 922.

2 See **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 921.

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391. Devolution on intestacy.

On a mortgagee's death intestate both the mortgage debt and the mortgaged property devolve on the administrator¹, whose duty it is to get in the mortgage money and apply it in due course of administration, the beneficial interest in any surplus being in the persons entitled under the rules for the distribution of the residuary estate².

1 See the Administration of Estates Act 1925 ss 1(1), 3(1); and PARA 387.

2 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 531 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(1) IN GENERAL/392. Duties owed by mortgagee.

8. RIGHTS AND LIABILITIES OF THE MORTGAGEE

(1) IN GENERAL

392. Duties owed by mortgagee.

A mortgagee owes duties in equity to the mortgagor arising out of the particular relationship between them¹. This duty extends to any subsequent incumbrancer² or surety³. The duties cannot be replaced or supplemented by a liability in negligence⁴ or extended to others such as beneficiaries under a trust of the mortgaged property⁵. They can be excluded by agreement⁶. The mortgagee is not obliged to exercise his powers even if advised to do so, although the mortgaged property is depreciating and however advantageous it might be to the mortgagor⁷. He can decide if and when to exercise his powers on the basis of his own interests⁸. He is not obliged to enforce his security and may rely on the personal covenant for payment⁹.

The mortgagee does, however, owe a general duty to exercise his powers in good faith¹⁰ for the purpose of obtaining repayment¹¹ which flows from the equitable principles for the enforcement of mortgages and the protection of borrowers, that a mortgage is security for the repayment of a debt and that a security for repayment of a debt is only a mortgage¹². He also owes specific duties once he exercises his powers¹³. It has been said that he owes a duty to act fairly towards the mortgagor¹⁴.

A mortgagee owes no duty to explain the security to the mortgagor¹⁵. However, he may have to explain the security or ensure the mortgagor obtains independent legal advice to avoid being fixed with constructive notice of the right of a mortgagor who is securing the debts of another to set the transaction aside¹⁶.

A mortgagee also owes specific duties to a surety¹⁷.

The limitation period for a claim for breach of the duty in equity owed by a mortgagee is six years¹⁸.

1 *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12, [1990] 2 All ER 577, CA; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

2 If there is a subsequent incumbrancer who is able to obtain full repayment notwithstanding a breach of duty by the prior mortgagee, the mortgagor can make a claim in respect of such breach of duty: *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC.

3 *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC. The guarantor's liability is reduced by the amount by which the property was sold at an undervalue: see *Skipton Building Society v Stott* [2001] QB 261, [2000] 2 All ER 779, CA.

4 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC. See also *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12, [1990] 2 All ER 577, CA. Dicta in earlier cases (see eg *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA; *American Express International Banking Corp v Hurley* [1985] 3 All ER 564, 2 BCC 98, 993; *Knight v Lawrence* [1991] 1 EGLR 143, [1991] BCC 411) that the mortgagee owes a duty of care in tort must be read in the light of these authorities.

5 *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12, [1990] 2 All ER 577, CA. A beneficiary can sue on behalf of the trust if the trustee unreasonably refuses to do so or has committed some breach of his duties to the beneficiaries: *Parker-Tweedale v Dunbar Bank plc* above.

6 *Bishop v Bonham* [1988] 1 WLR 742, [1988] BCLC 656, CA; *Armitage v Nurse* [1998] Ch 241, [1997] 2 All ER 705, CA (exemption clause in trust deed); cf *Barclays Bank plc v Kingston* [2006] EWHC 533 (QB), [2006] 1 All ER (Comm) 519, [2006] 2 Lloyd's Rep 59 (bank's standard terms did not relieve it of the duty). The Unfair Contracts Terms Act 1977 does not apply to contracts for the disposition of an interest in land: see s 1(2), Sch 1 para 1(b). An exclusion clause contained in a mortgage to which the provisions of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, apply may, however, be regarded as unfair: see reg 5(5), Sch 2 para 1(b) (which refers only to contractual obligations but may be applied by analogy to equitable obligations). As to the application and effect of the regulations see PARAS 229-230.

7 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA; *Lloyd's Bank v Bryant* [1996] NPC 31, CA. See also *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC.

8 *Routestone Ltd v Minorities Finance Ltd* [1997] 1 EGLR 123, [1997] BCC 180. As to the right to choose between remedies see PARA 514.

9 *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472, [1991] 4 All ER 989, PC.

10 The duty of good faith is not breached by conduct which is not dishonest or otherwise tainted by bad faith: *Medforth v Blake* [2000] Ch 86, CA, [1999] 3 All ER 97.

11 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997. For examples of breach of this duty see *Downsview Nominees Ltd v First City Corp Ltd*; *Albany Home Loans Ltd v Massey* [1997] 2 All ER 609, 29 HLR 902, CA; *Quennell v Maltby* [1979] 1 All ER 568, [1979] 1 WLR 318, CA; *Sadiq v Hussain* [1997] NPC 19, 73 P & CR D44, CA.

12 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC.

13 As to the liabilities of a mortgagee in possession, for example, see PARA 428 et seq.

14 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA; *AIB Finance Ltd v Debtors* [1998] 2 All ER 929, [1998] 1 BCLC 665, CA (but cf *Starling v Lloyds TSB Bank plc* [2000] Lloyd's Rep Bank 8, [2000] 1 EGLR 101); *Yorkshire Bank plc v Hall* [1999] 1 All ER 879, [1999] 1 WLR 1713, CA.

15 *Barclays Bank plc v Khaira* [1992] 1 WLR 623, [1991] NPC 141; on appeal on another point [1993] 1 FLR 343, [1993] Fam Law 124, CA.

16 See PARA 150 et seq.

17 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1142 et seq.

18 See *Raja v Lloyds TSB Bank plc* [2001] EWCA Civ 210, 82 P & CR 191, [2001] Lloyd's Rep Bank 113; and **LIMITATION PERIODS** vol 68 (2008) PARAS 953-954.

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(2) RIGHT TO PROTECT SECURITY

(i) Rights as against the Mortgagor

393. Rights as regards title.

As regards the title to the mortgaged property¹, if the mortgagee has in the first instance taken an equitable title, but with an agreement for a legal mortgage², he is entitled to have a legal mortgage executed on request, and will be allowed any charges and expenses properly incurred in preparing the mortgage³. If the mortgagor has conveyed to the mortgagee a defective title and subsequently acquires an interest which enables him to cure the defect, the mortgagee can call upon him to perfect the mortgage title⁴. Subject to the statutory provisions which relate to the effect of the registration of a mortgage or the failure to register a mortgage upon its priority⁵, the mortgagee's right to have his title perfected gives him an equitable interest which will prevail against a subsequent incumbrancer who takes the legal estate with notice⁶, but not if he takes without notice⁷.

1 As to the enforcement of the mortgagee's rights generally see PARA 715 et seq.

2 See PARA 105.

3 *National Provincial Bank of England v Games* (1886) 31 ChD 582, CA; and see PARA 744. As to feeding an estoppel see PARA 193.

4 *Smith v Osborne* (1857) 6 HL Cas 375 at 390 per Lord Cranworth. As to mortgages see *Seabourne v Powell* (1686) 2 Vern 11. As to sales cf *Taylor v Debar* (1675) 1 Cas in Ch 274; *Smith v Baker* (1842) 1 Y & C Ch Cas 223.

5 See PARA 258 et seq.

6 *Jennings v Moore* (1708) 2 Vern 609; affd sub nom *Blenkarne v Jennens* 2 Bro Parl Cas 278.

7 *Oxwick v Plumer* (1708) 5 Bac Abr Mortgage (E) 3. Where the mortgagor had no title at all at the time of the mortgage, and subsequently acquired a title, it was doubted whether his heir was bound to convey: *Morse v Faulkner* (1792) 1 Anst 11.

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394. Rights as regards value of property.

As regards the value of the property itself, the mortgagee's rights possibly depend to some extent upon the circumstance that the mortgagor while in possession is a quasi-tenant¹, but, more substantially, they depend on the general principle that the mortgagee is entitled to have the security kept unimpaired. Hence, the mortgagor must not deal with the property so as to diminish its value². Moreover, the mortgagee, if in possession, is entitled to lay out any money necessary for the maintenance of the property³. The mortgagee is not, however, obliged to preserve the mortgaged property prior to taking possession⁴.

1 See *Partridge v Bere* (1822) 5 B & Ald 604 at 605 note (a); *Hitchman v Walton* (1838) 4 M & W 409. See also PARA 341.

2 See PARA 358.

3 *Sandon v Hooper* (1843) 6 Beav 246; affd (1844) 14 LJCh 120. As to repairs and improvements see PARA 745.

4 *AIB Finance Ltd v Debtors* [1998] 2 All ER 929, [1998] 1 BCLC 665, CA.

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395. Injunction and other remedies.

Apart from the doctrine of waste¹, the mortgagee is entitled to restrain the mortgagor from conduct which would prejudice the mortgage security². Upon a mortgage of goods where the mortgagor retains the right of possession until default, an improper sale by him determines his right, and gives the immediate right to possession to the mortgagee who can then sue for conversion³.

1 See PARAS 358-359.

2 Thus under a mortgage of tolls by the trustees of a road, the trustees might be restrained from reducing the tolls: *Lord Crewe v Edleston* (1857) 1 De G & J 93 at 110. Where a company has mortgaged a call on its shares, it cannot make a second call and get it in first at the mortgagee's expense (*Re Humber Ironworks Co, ex p Warrant Finance Co* (1868) 16 WR 667); and where property is subject to a vendor's lien, a sale of part will be restrained (*Blakely v Dent, Re Blakely Ordnance Co* (1867) 15 WR 663). See also **CIVIL PROCEDURE** vol 11 (2009) PARAS 473-474.

3 *Fenn v Bittleston* (1851) 7 Exch 152.

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(ii) Rights as against Third Persons

396. Right to protect title against third persons.

As against third persons, the mortgagee is entitled to protect his own or the mortgagor's title to the mortgaged property, and to maintain the value of that property. Thus if the mortgagor's title is impeached, the mortgagee may take any step necessary to support it¹. If he is an equitable mortgagee, and a third person with an inferior title proposes to dispose of the legal estate, the mortgagee can obtain an injunction to restrain him². As a rule, questions between the mortgagee and mortgagor can be determined without bringing in third persons³, but where, as in redemption and foreclosure, other persons claiming an interest in the equity of redemption are affected, they must be made parties⁴. In general, however, the mortgagee will have to defend, at his own expense, proceedings brought by third persons to impeach the mortgage security⁵; and the first mortgagee cannot as against the second mortgagee deduct from the proceeds of sale by the first mortgagee costs caused by the mortgagor's contesting the sale, as costs 'incident to the sale'⁶. Where, however, in proceedings for the execution of trusts, the beneficiaries desire to impeach a mortgage by the trustees, and for that purpose make the mortgagee a party, he will apparently, if successful, be allowed his costs⁷.

1 *Godfrey v Watson* (1747) 3 Atk 517 at 518; *Sandon v Hooper* (1843) 6 Beav 246 at 248. See also PARAS 766-767.

2 *London and County Banking Co v Lewis* (1882) 21 ChD 490, CA. As to equitable mortgages see PARA 105.

3 See eg *Petre v Duncombe* (1848) 7 Hare 24.

4 *Evans v Jones* (1853) Kay 29. As to the equity of redemption see PARA 302 et seq. As to foreclosure see PARA 566 et seq.

5 *Parker v Watkins* (1859) John 133; *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA.

6 *Ie under the Law of Property Act 1925 s 105: see PARA 472. See also Re Smith's Mortgage, Harrison v Edwards* [1931] 2 Ch 168; and PARA 767. For the right of mortgagees to apply to the court to mitigate any financial hardship caused on enfranchisement under the Leasehold Reform Act 1967 see s 36; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1464.

7 See *Langton v Langton* (1855) 7 De GM & G 30.

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397. Right to recover and maintain property.

As regards the recovery or preservation of the mortgaged property, the mortgagee may be entitled to bring proceedings against third persons either by virtue of his immediate legal estate in the property, or of his possession or immediate right to possession. In relation to tenancies granted on or after 1 January 1996¹, a mortgagee in possession can enforce any covenant or any right of re-entry enforceable by the mortgagor². In relation to land, the mortgagor retains a legal estate and while in possession has the statutory right to bring certain proceedings in his own name³. In other cases a mortgagor can usually sue in his own name by virtue of his beneficial interest, subject to the mortgagee's security⁴. Even though the mortgagor of personalty can sue alone by virtue of his equitable ownership, it may be necessary to join the mortgagee, if, for instance, it is necessary for the legal estate to be before the court, or if accounts have to be taken which are to be made binding on the mortgagee⁵.

1 *Ie the commencement date of the Landlord and Tenant (Covenants) Act 1995.*

2 See the Landlord and Tenant (Covenants) Act 1995 s 15 (amended by the Land Registration Act 2002 s 133, Sch 11 para 33(1), (2)). By implication a mortgagee cannot enforce any covenant or any right of re-entry until in possession.

3 See the Law of Property Act 1925 ss 98(1), 141(2). See also the Landlord and Tenant (Covenants) Act 1995 ss 3, 15; and PARAS 338-339.

4 *Fairclough v Marshall* (1878) 4 Ex D 37, CA; *Van Gelder, Apsimon & Co v Sowerby Bridge United District Flour Society* (1890) 44 ChD 374, CA.

5 As to accounts see PARA 705 et seq.

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398. Right to sue for trespass to land.

Where the mortgagee is in possession of land he can sue a third person in trespass¹, and, after entry, his right of possession relates back to the time when his right to possession accrued, so as to enable him to maintain a claim for trespass committed by a stranger before his entry. This is so whether the mortgagee has a legal estate or not².

1 It seems that he may also be able to sue if he has the immediate right to possession as against the mortgagor, for it has been said that a lessor at will can sue in trespass: see *Harper v Charlesworth* (1825) 4 B & C 574 at 583; *Geary v Bearecroft* (1667) 1 Lev 202; and **TORT** vol 45(2) (Reissue) PARA 518. Formerly, if the security was by way of demise, the mortgagee could not sue in trespass before he had entered: *Wheeler v Montefiore* (1841) 2 QB 133 at 142; *Doe d Parsley v Day* (1842) 2 QB 147 at 156. However, this was altered by the Law of Property Act 1925 s 149(2): see **REAL PROPERTY** vol 39(2) (Reissue) PARA 102. See also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 118.

2 *Ocean Accident and Guarantee Corpn Ltd v Ilford Gas Co* [1905] 2 KB 493, CA.

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399. Right to sue for trespass or conversion of goods.

Where the mortgagee is in possession, or has the immediate right to possession, of goods, he can sue for trespass or conversion, or to recover the goods¹, and is the proper person to do so², but the mortgagor, on tendering the amount due, is entitled to sue the mortgagee in conversion³. Similarly, a vendor who retains possession of goods subject to his lien is the proper person to sue in conversion in the event of the conversion of the goods by a stranger⁴. The lawful holder of a bill of lading, to whom the property in the goods mentioned in it passes, has transferred to and vested in him all rights of suit under the contract of carriage⁵. Proceedings for trespass or conversion are not open to the mortgagee if the mortgagor is entitled under the mortgage to retain possession till a certain event, such as demand of payment and default, and that event has not happened⁶; although, if goods are mortgaged by way of assignment to the mortgagee upon trust to allow the mortgagor to remain in possession till demand of payment, the mortgagee is considered to have the right to immediate possession upon the analogy of the case of trustee and beneficiary⁷. Where the mortgagee is entitled to sue in conversion, he

can recover as damages the full value of the goods⁸, whether he is or is not liable to account for any surplus to the mortgagor⁹.

1 Trespass, trover and detinue were all possessory actions, and the plaintiff had to show either actual possession or the right to immediate possession: *Gordon v Harper* (1796) 7 Term Rep 9. As to the abolition of detinue and the introduction of the concept of wrongful interference with goods see the Torts (Interference with Goods) Act 1977 ss 1, 2; and **TORT** vol 45(2) (Reissue) PARA 542 et seq.

2 *Sewell v Burdick* (1884) 10 App Cas 74 at 92, HL; *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653, CA.

3 *Franklin v Neate* (1844) 13 M & W 481 at 484. See also note 1.

4 *Lord v Price* (1874) LR 9 Exch 54.

5 See the Carriage of Goods by Sea Act 1924 s 2; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 338 et seq. Under the Bills of Lading Act 1855, the rights and liabilities of the shipper were transferred only to a person who obtained full property and not to an indorsee who was a mere pledgee: see *Sewell v Burdick* (1884) 10 App Cas 74 at 96, HL; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 351. See also *Burgos v Nascimento* (1908) 100 LT 71; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 241, 368.

6 *Bradley v Copley* (1845) 1 CB 685.

7 *White v Morris* (1852) 11 CB 1015; cf *Barker v Furlong* [1891] 2 Ch 172.

8 *Brierly v Kendall* (1852) 17 QB 937 at 943.

9 *The Winkfield* [1902] P 42, CA (overruling *Claridge v South Staffordshire Tramway Co* [1892] 1 QB 422, DC). See also **DAMAGES** vol 12(1) (Reissue) PARA 867. As to remedies see further the Torts (Interference with Goods) Act 1977 ss 3-6; and **TORT** vol 45(2) (Reissue) PARAS 653-655.

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400. General right to prevent deterioration.

In general, a mortgagee is entitled to bring proceedings to prevent the deterioration of his security¹. Where the property is to be compulsorily acquired, notice to treat must be served on him as well as on the mortgagor². If the property consists of licensed premises, the mortgagee can appeal to the Crown Court against non-renewal of the licence³. A prior mortgagee is also entitled to an injunction to prevent the mortgaged property being taken or dealt with by a subsequent incumbrancer⁴, but the mortgagee cannot obtain an injunction unless he is prejudiced by the conduct complained of. Thus if the mortgage comprises the goodwill of a business and the right to use a name, the mortgagee, if he does not intend to use the name, cannot prevent the mortgagor's assignees from using it⁵. A mortgagee is entitled to bring proceedings against a prior mortgagee and a receiver appointed by him to prevent any breach of the equitable duty owed to subsequent mortgagees as well as to the mortgagor, or claim damages for any breach which occurs⁶. A mortgagee is justified in procuring a breach of contract between the mortgagor and a third party in defence and protection of his right to repayment of the secured indebtedness⁷.

1 See *Western Bank Ltd v Schindler* [1977] Ch 1 at 9-10, [1976] 2 All ER 393 at 396, CA, per Buckley LJ. As to the liability of the mortgagor for waste and other liabilities see PARAS 358-360.

2 *Cooke v LCC* [1911] 1 Ch 604. See also **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 619. As to the position of mortgagees in regard to compulsory purchase see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 711 et seq.

3 *Garrett v St Marylebone, Middlesex, Justices* (1884) 12 QBD 620. See also the Licensing Act 2003 s 178 (notification of licensing matters); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 39.

4 *Legg v Mathieson* (1860) 2 Giff 71; *Wildy v Mid-Hants Rly Co* (1868) 16 WR 409.

5 *Beazley v Soares* (1882) 22 ChD 660; and see generally **CIVIL PROCEDURE** vol 11 (2009) PARAS 473-474. As to goodwill generally see **PARTNERSHIP** vol 79 (2008) PARA 213 et seq; **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1206 et seq; **COMPETITION** vol 18 (2009) PARAS 373-376.

6 *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, [1993] 3 All ER 626, PC. As to the duties owed by a mortgagee and receiver see PARA 424 et seq.

7 *Edwin Hill & Partners v First National Finance Corpn plc* [1989] 1 WLR 225, [1989] BCLC 89, CA.

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401. Right to relief from forfeiture.

A mortgagee¹ is entitled to apply for relief from forfeiture for non-payment of rent as the lessee² or to apply for a vesting order³. In cases of forfeiture for other breaches of covenant, the court has a discretion to grant a mortgagee of the property relief from forfeiture or to make a vesting order⁴. Even if the landlord obtains an order for possession, a mortgagee can apply after execution to intervene in the proceedings to seek relief, but such an application is unlikely to succeed if the mortgagee was notified of the proceedings before judgment was obtained but failed to intervene until after judgment⁵. The effect of an order for relief from forfeiture is to restore the lease as if it had never been forfeited, and with it any underlease⁶. Where a vesting order is made, a new lease is granted as from the date of the order granting it⁷, and the new lease is regarded as a substituted security in the mortgagee's hands⁸. The court does not have power to grant relief from forfeiture for breaches of covenant other than for the payment of rent under its inherent equitable jurisdiction⁹.

1 No distinction is to be drawn between a mortgagee by sub-demise or a mortgagee by way of legal charge: *Grand Junction Co Ltd v Bates* [1954] 2 QB 160, [1954] 2 All ER 385; *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA. An equitable mortgagee or chargee is treated as an underlessee and thus as a lessee: see the Law of Property Act 1925 s 146(5)(d); and the County Courts Act 1984 s 140. See also *Re Good's Lease, Good v Wood* [1954] 1 All ER 275, [1954] 1 WLR 309; *Escalus Properties Ltd v Robinson* [1996] QB 231, [1995] 4 All ER 852, CA; *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, 67 P & CR 18, CA.

2 See the Common Law Procedure Act 1852 s 210; the Senior Courts Act 1981 s 38; the County Courts Act 1984 s 138; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 628-629. See also the Law of Property Act 1925 s 146; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 619 et seq. See further *Doe d Wyatt v Byron* (1845) 1 CB 623; *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA; *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, 67 P & CR 18, CA; *Escalus Properties Ltd v Robinson* [1996] QB 231, [1995] 4 All ER 852, CA. As to the circumstances in which and the terms on which relief is available see *Escalus Properties Ltd v Robinson* above. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

3 See the Law of Property Act 1925 s 146(4). See also the County Courts Act 1984 s 138(9C); and **COURTS** vol 10 (Reissue) PARA 716.

4 See the Law of Property Act 1925 s 146(2), (4); and *Escalus Properties Ltd v Robinson* [1996] QB 231, [1995] 4 All ER 852, CA. The court has jurisdiction to grant relief under the Law of Property Act 1925 s 146(4)

notwithstanding a disclaimer of the lease before forfeiture: *Barclays Bank plc v Prudential Assurance Co Ltd* [1998] BCC 928, [1998] 1 EGLR 44.

5 *Rexhaven Ltd v Nurse and Alliance and Leicester* (1995) 28 HLR 241, [1995] EGCS 125.

6 *Dendy v Evans* [1910] 1 KB 263, CA. This is usually more advantageous to the mortgagee than a vesting order since there is no period in respect of which the landlord can claim mesne profits: see *Escalus Properties Ltd v Robinson* [1996] QB 231, [1995] 4 All ER 852, CA.

7 *Cadogan v Dimovic* [1984] 2 All ER 168, [1984] 1 WLR 609, CA; *Official Custodian for Charities v Mackey* [1985] Ch 168, [1984] 3 All ER 689.

8 *Chelsea Estates Investment Trust Co Ltd v Marche* [1955] Ch 328, [1955] 1 All ER 195.

9 *Ladup Ltd v Williams & Glyn's Bank plc* [1985] 2 All ER 577, [1985] 1 WLR 851; *Billson v Residential Apartments Ltd* [1991] 3 All ER 265, [1991] 1 EGLR 70, CA (revsd on another point [1992] 1 AC 494, [1992] 1 All ER 141, HL).

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(3) RIGHT TO POSSESSION OF THE MORTGAGED PROPERTY

(i) When the Right Arises

402. Right of legal mortgagee or chargee.

Where a legal mortgage has been created, whether by demise or by legal charge¹, and no provision is made for retention of possession by the mortgagor², the mortgagee is entitled as against the mortgagor to immediate possession³ or receipt of the rents and profits⁴ at any time after the execution of the mortgage; and equity does not interfere⁵, notwithstanding that there has been no default on the mortgagor's part⁶, or that a bill of exchange has been given for the debt⁷, or that considerable time has elapsed, provided a claim for possession is not statute-barred⁸. A mere power of sale on default does not, it seems, give a right of entry except on default, and then only for the purpose of a sale⁹. A mortgagee can choose whether to take possession or not, and he can foreclose without taking possession¹⁰. This applies to a second mortgagee as well as to the first mortgagee, as the second mortgage is now made by demise or legal charge, but a second mortgagee can only take possession subject to the first mortgagee's rights. The mere existence of a sub-charge does not deprive a principal chargee of the right to possession¹¹.

1 As to the rights conferred upon the mortgagee by a charge by way of legal mortgage see the Law of Property Act 1925 s 87(1); and PARA 191.

2 See *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA; *Keech v Hall* (1778) 1 Doug KB 21; *Gibbs v Cruikshank* (1873) LR 8 CP 454 at 461; *Moore v Shelley* (1883) 8 App Cas 285, PC. The change in the nature of legal mortgages, from a conveyance of the fee simple to a demise for a term of years, did not alter this incident of the security: see the Law of Property Act 1925 s 95(4), which provides that nothing in the Act affects prejudicially the right of a mortgagee of land, whether or not his charge is secured by a legal term of years absolute, to take possession of the land. It is expressly recognised that a legal charge gives this right: see s 87(1); and PARA 191. As to the effect of a re-demise by the mortgagee of the mortgaged property to the mortgagor either expressly or by implication see PARAS 341-344. Where the advance is repayable by instalments it may be implied that the mortgagor is to retain possession unless he defaults: see *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883 at 890, [1962] 1 All ER 163 at 168 per Russell J; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358 at 367-368, [1975] 1 WLR 1474 at 1483-1484 per Walton J.

- 3 *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 All ER 35; *Western Bank Ltd v Schindler* [1977] Ch 1, [1976] 2 All ER 393, CA; *Centrax Trustees Ltd v Ross* [1979] 2 All ER 952.
- 4 *Pope v Biggs* (1829) 9 B & C 245.
- 5 *Marquis of Cholmondeley v Lord Clinton* (1817) 2 Mer 171; *London Permanent Benefit Building Society v De Baer* [1969] 1 Ch 321, [1968] 1 All ER 372.
- 6 *Doe d Roylance v Lightfoot* (1841) 8 M & W 553; *Rogers v Grazebrook* (1846) 8 QB 895; *Green v Burns* (1879) 6 LR 173; *Western Bank Ltd v Schindler* [1977] Ch 1, [1976] 2 All ER 393, CA.
- 7 *Bramwell v Eglinton* (1864) 5 B & S 39.
- 8 *Wright v Pepin* [1954] 2 All ER 52, [1954] 1 WLR 635. As to the effect of lapse of time on a mortgagee's right to bring a claim for possession see **LIMITATION PERIODS** vol 68 (2008) PARA 1016 (12 year period for proceedings to recover land). As to the limitation period in relation to foreclosure claims see **LIMITATION PERIODS** vol 68 (2008) PARA 1124 et seq. As to the extension or postponement of limitation periods see **LIMITATION PERIODS** vol 68 (2008) PARA 1168 et seq.
- 9 *Watson v Waltham* (1835) 2 Ad & El 485.
- 10 *Lord Penrhyn v Hughes* (1799) 5 Ves 99 at 106. As to foreclosure see PARA 566 et seq.
- 11 *Credit and Mercantile plc v Marks* [2004] EWCA Civ 568, [2005] Ch 81, [2004] 3 WLR 489.

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403. Position of equitable incumbrancer.

An incumbrancer who has no legal mortgage has no right to enter into possession of the land until he obtains a court order¹, but if his charge is created by instrument under seal he can appoint a receiver², and if his charge arises otherwise he can obtain the appointment of a receiver by the court³. The mortgagee may expressly give an equitable incumbrancer the right to take possession⁴; and if the incumbrancer gives notice to the tenant to pay the rent to him, this, by virtue of the agreement, entitles the mortgagee to the rents as against a judgment creditor apart from the question of the mortgagee's right to recover possession⁵. The appointment of a receiver does not, however, give priority over a judgment creditor if the receiver has not given notice to the tenant, or claimed payment, before judgment is recovered against the mortgagor⁶.

- 1 *Barclays Bank Ltd v Bird* [1954] Ch 274, [1954] 1 All ER 449. Cf *Vacuum Oil Co Ltd v Ellis* [1914] 1 KB 693, CA; *Garfitt v Allen*, *Allen v Longstaffe* (1887) 37 ChD 48 at 50; but see *Spencer v Mason* (1931) 75 Sol Jo 295.
- 2 See PARAS 475-484.
- 3 See PARAS 560-565. As to the kinds of equitable mortgages see PARA 105.
- 4 *Ocean Accident and Guarantee Corpn Ltd v Ilford Gas Co* [1905] 2 KB 493 at 497, CA.
- 5 *Campion v Palmer* [1896] 2 IR 445, Ir CA.
- 6 *Vacuum Oil Co Ltd v Ellis* [1914] 1 KB 693, CA.

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When the Right Arises/404. Date from which equitable mortgagee is entitled to rents and profits.

404. Date from which equitable mortgagee is entitled to rents and profits.

If a receiver is not appointed, but the equitable incumbrancer obtains an order for sale, he is entitled to the rents at least from the date of the order¹. It is not clearly settled whether the equitable mortgagee is entitled to rents from the date of the order for sale or from the date of the application on which the order for sale is made. In some cases the rents have been allowed from the date of the order for sale², notwithstanding that the mortgagee did not establish his title until subsequently³. However, a mortgagee has been held entitled to the produce of the mortgaged property from the time of presenting a petition for sale⁴, and to the rents from the date of an order for inquiry as to title, and not only from the date when the title was affirmed and an order for sale made⁵. A mortgagee does not entitle himself to the rents before the order for sale by giving notice to the tenants to pay the rents to him⁶, unless, of course, his mortgage entitles him to go into possession. Where a receiver is appointed, the relevant date is neither the date of the institution of proceedings to raise the money secured, nor the date of the order for sale, but the date of the appointment⁷. An equitable mortgagee by deposit who gives notice to, and receives rent from, the tenant can retain it as against him⁸.

1 *Vacuum Oil Co Ltd v Ellis* [1914] 1 KB 693, CA.

2 *Rele, ex p Bignold* (1835) 4 Deac & Ch 259; *Re Tombs, ex p Living* (1835) 2 Mont & A 223; *Re Birks, ex p Carlon* (1837) 3 Mont & A 328; *Re Norman, ex p Burrell* (1838) 3 Mont & A 439; *Re Pearson, ex p Scott* (1838) 3 Mont & A 592. In *Re Keer, ex p Bignold* (1832) 2 Deac & Ch 398, the mortgagee only asked for the rents from the date of the order for sale. In *Re Tills, ex p Alexander* (1827) 2 Gl & J 275, Lord Eldon LC held that the mortgagor's assignees in bankruptcy took the rents till the actual sale, but this ruling has not been followed.

3 *Re Teesdale and Swales, ex p Thorpe* (1838) 3 Mont & A 441.

4 *Re Harvey, ex p Bignold* (1827) 2 Gl & J 273.

5 *Re Feaver, ex p Smith* (1844) 3 Mont D & De G 680.

6 *Re Pearson, ex p Scott* (1838) 3 Mont & A 592.

7 *Butler v Butler* [1925] 1 IR 185, where the position of the equitable mortgagee when the mortgagor is bankrupt was distinguished. As to the appointment of a receiver see PARAS 475 et seq, 560 et seq.

8 *Re Freeman, ex p Williams* (1865) 13 WR 564; *Finck v Tranter* [1905] 1 KB 427. As to equitable mortgages by deposit see PARA 119 et seq. Note that it is no longer possible to create an equitable mortgage by deposit of deeds alone: see PARA 118.

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405. Effect of cross-claim by mortgagor on the mortgagee's right to possession.

A legal mortgagee's right to possession cannot, in the absence of some contractual or statutory provision to the contrary, be defeated by a cross-claim for damages made by a mortgagor, even if the cross-claim is liquidated and admitted and in excess of the mortgage arrears, or is for unliquidated damages giving rise to a right of equitable set-off¹. However, in the case of a dwelling house, the court may adjourn proceedings for possession, stay or suspend an order for

possession, or postpone the date for possession², if the existence and prospects of success of the mortgagor's cross-claim could be regarded as enabling the sums due to be paid within a reasonable time³.

1 *Mobil Oil Co Ltd v Rawlinson* (1981) 43 P & CR 221, 126 Sol Jo 15; *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA; *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA; *Midland Bank plc v McGrath* [1996] EGCS 61, CA.

2 As to the powers of the court to suspend orders for possession see the Administration of Justice Act 1970 s 36, Administration of Justice Act 1973 s 8; and PARAS 554-555.

3 *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA; *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA.

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406. Right of entry arising on default of payment on demand.

Where the right of entry is to arise only on default in payment of the mortgage debt on demand, such time as may be required should be allowed for compliance with the demand before the mortgagee enters¹. If a mortgagee of goods seizes them too soon, the mortgagor recovers as damages, not the value of the goods, but the value of his interest in them²; but a premature taking of possession does not prevent the mortgagee from taking possession in due time³.

1 *Toms v Wilson* (1863) 4 B & S 442, Ex Ch.

2 *Brierly v Kendall* (1852) 17 QB 937; *Chinery v Viall* (1860) 5 H & N 288; *Toms v Wilson* (1863) 4 B & S 442, Ex Ch.

3 *Bramwell v Eglinton* (1864) 5 B & S 39. As to seizure of goods under the present law see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1788 et seq.

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(ii) Exercise of the Right

407. When entry can be made or proceedings brought without notice.

When the mortgagee has a right of entry and allows the mortgagor to remain in possession, he is not bound to give any notice to the mortgagor before entering¹; and similarly he can bring proceedings to recover the land without any previous notice or demand of possession². The court will not interfere with the mortgagee's right to possession on account of the pendency of administration proceedings³, but the exercise of the right of entry may be subject to restriction under the Insolvency Act 1986⁴.

A mortgagor has been described as a tenant at will⁵, but this analogy is misleading, and it is, perhaps, more correct to say that he remains at the mortgagee's will, or that the mortgagee is entitled at any moment to treat him as a trespasser⁶. If, however, the mortgagor is indeed made tenant at will by the contract, he holds subject to the legal incidence of that relation⁷. Where the mortgagor has attorned tenant to the mortgagee⁸, the necessity for any notice or demand previous to entry⁹ is usually avoided by express provision that the mortgagee is to be entitled to enter without notice at any time after default in payment of the principal money¹⁰.

1 *Keech v Hall* (1778) 1 Doug KB 21; 1 Smith LC (13th Edn) 562; *Birch v Wright* (1786) 1 Term Rep 378 at 383. See also PARA 341.

2 *Doe d Fisher v Giles* (1829) 5 Bing 421; *Jolly v Arbuthnot* (1859) 4 De G & J 224 at 236. See also paras 541-543. As to proceedings for the delivery of possession see PARA 546 et seq.

3 *Crowle v Russell* (1878) 27 WR 84, CA.

4 See PARA 517 et seq; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 647 et seq. As to the effect of the Administration of Justice Act 1970 s 36 (see PARA 554) see *Ropaigealach v Barclays Bank plc* [2000] QB 263, (1998) 77 P & CR D32, CA.

5 See *Keech v Hall* (1778) 1 Doug KB 21.

6 *Doe d Roby v Maisey* (1828) 8 B & C 767; *Jolly v Arbuthnot* (1859) 4 De G & J 224; and see PARAS 341-344.

7 *Re Skinner, ex p Temple and Fische* (1822) 1 Gl & J 216. As to tenancies at will see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 198 et seq.

8 As to attornment clauses see PARA 343.

9 As to the principle that notice is normally necessary before the mortgagor goes into possession where there is an attornment clause see *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 at 320, [1957] 2 All ER 35 at 36 per Harman J.

10 *Doe d Garrod v Olley* (1840) 12 Ad & El 481; *Doe d Snell v Tom* (1843) 4 QB 615; *Jolly v Arbuthnot* (1859) 4 De G & J 224; *Metropolitan Counties Assurance Society v Brown* (1859) 4 H & N 428. As to the principle that the reservation of a right of re-entry without notice does not in itself convert a yearly tenancy into a tenancy at will see PARA 343. As to the effect of such a provision on the mortgagee's right to take proceedings for possession see PARA 344.

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408. Exercise of right of entry.

Where the mortgaged property is in the occupation of the mortgagor or of a tenant of the mortgagor whose tenancy is not binding on the mortgagee¹, the mortgagee exercises his right to possession either by entering on the land if this can be done peaceably², or by making a claim in a county court or, where that court does not have jurisdiction³, the Chancery Division of the High Court, for delivery of possession of the land⁴. If the mortgaged property is in the occupation of a tenant whose tenancy is binding⁵ on the mortgagee, the mortgagee exercises his right by giving the tenant notice to pay the rent to him.

1 See PARA 293 et seq.

2 See *Ropaigealach v Barclays Bank plc* [2000] QB 263, (1998) 77 P & CR D32, CA. As to criminal penalties for forcible entry see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 602 et seq. See also

LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 652. As to the right to possession of a mortgagee who has entered forcibly see PARA 411.

3 See PARA 546.

4 See PARA 546 et seq. A claim for possession is simply a claim for the recovery of land and is not proceedings for enforcing the mortgage: *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358 at 365, [1975] 1 WLR 1474 at 1481 per Walton J. Nothing in the Protection from Eviction Act 1977 affects the jurisdiction of the High Court in proceedings to enforce a lessor's right of re-entry or forfeiture or to enforce a mortgagee's right of possession in a case where the former tenancy was not binding on the mortgagee: s 9(3).

5 See PARA 293 et seq. As to spouses', civil partners' and cohabitants' occupation rights where a dwelling house is subject to a mortgage see the Family Law Act 1996 ss 54-56; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 285-287.

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409. Effect of prior possession by receiver.

If, at a time when the mortgagee wishes to go into possession, he finds a receiver appointed by the court in possession¹, and the rights of prior incumbrancers have not been preserved, he must apply in the proceedings in which the receiver was appointed for the receiver's discharge and for liberty to take possession²; and the mortgagee is not entitled to rents collected by the receiver before the mortgagee's application to the court³. If, however, the existence of prior incumbrancers is known, the order is made subject to, or with a proviso that it is not to affect, their right to take possession. Tenants will then be justified in paying their rents to the mortgagee after notice from him, and he is entitled to possession as against the receiver⁴; but if any difficulty arises in asserting his right he should apply to the court in the proceedings in which the receiver was appointed⁵.

1 See PARA 564.

2 *Angel v Smith* (1804) 9 Ves 335; *Thomas v Brigstocke* (1827) 4 Russ 64; *Langton v Langton* (1855) 7 De GM & G 30; *Walmsley v Munday* (1884) 13 QBD 807, CA; and see *Searle v Choat* (1884) 25 ChD 723, CA.

3 *Re Metropolitan Amalgamated Estates Ltd, Fairweather v Metropolitan Amalgamated Estates Ltd* [1912] 2 Ch 497.

4 *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 137; *Underhay v Read* (1887) 20 QBD 209 at 219, CA.

5 *Searle v Choat* (1884) 25 ChD 723.

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(iii) What Amounts to Possession

410. Entry on part.

A mortgagee who is entitled to vacant possession of the property acquires possession of the whole of the property by entering on part, provided that the property is so bounded and defined that entry on part can be regarded as entry on the whole¹; but a mortgagee is entitled to limit his possession to part of the property, and, if that is his intention, he will not be charged as being constructively in possession of the whole². Thus where a farm is let to a tenant without the shooting or timber, notice to pay rent to the mortgagee will put him in possession of the farm only, and not of the shooting and timber³.

1 Cf *Low Moor Co v Stanley Coal Co Ltd* (1876) 34 LT 186, CA.

2 *Soar v Dalby* (1852) 15 Beav 156.

3 *Simmins v Shirley* (1877) 6 ChD 173.

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411. Forcible entry.

Even if the mortgagee's entry is forcible so as to subject him to penalties under the criminal law¹, once he has entered his right to possession gives him the possession for civil purposes, and he can treat the mortgagor or any other person who is on the property as a trespasser².

1 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 602 et seq.

2 *Lows v Telford* (1876) 1 App Cas 414, HL; and see *Harvey v Brydges* (1845) 14 M & W 437 (affd (1847) 1 Ex Ch 261); *Beddall v Maitland* (1881) 17 ChD 174 at 188. See further **TORT** vol 45(2) (Reissue) PARA 505 et seq.

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412. Who may be treated as in possession.

A solicitor who pays off a mortgage for a client and receives the rents receives them as agent for the client, and is not a mortgagee in possession¹. If necessary, an inquiry as to the fact of possession will be directed², but not where the mortgagee has admitted this on his statements of case³.

1 *Ward v Carttar* (1865) LR 1 Eq 29. See also **AGENCY** vol 1 (2008) PARA 96.

2 *Dobson v Lee* (1842) 1 Y & C Ch Cas 714. See also *Wills v Palmer* (1904) 53 WR 169. Where land is not suitable for occupation, possession is gained by doing such acts of ownership as are possible: see *Lord Advocate v Young* (1887) 12 App Cas 544, HL; *Kirby v Cowderoy* [1912] AC 599, PC. As to possession by a receiver see *Re RW Hill Ltd and Simmons' Contract* [1920] WN 386.

3 *Parker v Watkins* (1859) John 133 at 137.

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413. Actual possession.

Where a mortgagee takes actual possession of the property, there is no doubt as to his intention to take possession, and he thereby assumes the liability of a mortgagee in possession¹. Where he gives notice to the tenants to pay their rents to him, it is equally clear that he intends to go into receipt of rents and profits, and this, as regards the liability to account, is equivalent to taking possession². This is also the case if the mortgagee gives notice to the tenants not to pay rent to the mortgagor³. The mortgagee must either take possession or leave the mortgagor in possession⁴. A receiver who, on being discharged, continues to receive the rents and pays them to the mortgagee will become the mortgagee's agent so as to put the mortgagee into possession⁵.

1 As to taking possession of goods situated on different premises see *Re Eslick, ex p Phillips, ex p Alexander* (1876) 4 ChD 496.

2 See *Horlock v Smith* (1842) 11 LJCh 157.

3 See *Mexborough UDC v Harrison* [1964] 2 All ER 109 at 111, [1964] 1 WLR 733 at 736-737 per Pennycuik J.

4 *Heales v M'Murray* (1856) 23 Beav 401.

5 *Horlock v Smith* (1842) 11 LJCh 157. As to the appointment of a receiver see PARAS 475 et seq, 560 et seq.

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414. Notice to tenant.

If a mortgagee merely receives from the mortgagor's agent a sum equal to the rents which the agent has collected, while the agent has not served on the tenants any notice on the mortgagee's behalf, this is not enough to render the mortgagee chargeable as a mortgagee in possession¹. In order to burden himself with the liability of a mortgagee in possession, the mortgagee must act in such a manner as to substitute himself for the mortgagor in the control and management of the estate². A mortgagee does not assume possession by insuring the property nor by merely making arrangements with the tenants, if they do not recognise him as landlord³.

1 *Noyes v Pollock* (1886) 32 ChD 53, CA. See also *Mexborough UDC v Harrison* [1964] 2 All ER 109 at 111, [1964] 1 WLR 733 at 736-737 per Pennycuik J.

2 See *Mexborough UDC v Harrison* [1964] 2 All ER 109 at 111, [1964] 1 WLR 733 at 736-737 per Pennycuik J.

3 *Ward v Carttar* (1865) LR 1 Eq 29.

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415. Tenancy created by mortgage deed.

Where the mortgage deed creates a tenancy in the mortgagor under the mortgagee at a rent¹, this does not put the mortgagee in possession so as to make him liable to account to subsequent incumbrancers for the amount of the rent reserved²; nor is the mortgagee liable in such a case to account as mortgagee in possession to the mortgagor³.

1 See PARA 342.

2 *Stanley v Grundy* (1883) 22 ChD 478; and see *Re Knight, ex p Isherwood* (1882) 22 ChD 384 at 392, CA. However, there have been several dicta to the contrary: see *Re Stockton Iron Furnace Co* (1879) 10 ChD 335 at 356, CA; *Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA; *Re Betts, ex p Harrison* (1881) 18 ChD 127 at 135, CA; *Green v Marsh* [1892] 2 QB 330 at 336, CA.

3 *Re Betts, ex p Harrison* (1881) 18 ChD 127, CA.

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416. Appointment of receiver.

A mortgagee in possession may relieve himself of his position and responsibility by appointing a receiver under his statutory power¹; and the court may appoint a receiver after a mortgagee has taken possession if the circumstances render it just and convenient².

1 *Anchor Trust Co v Bell* [1926] Ch 805 at 817; *Refuge Assurance Co v Pearlberg* [1938] Ch 687, [1938] 3 All ER 231, CA. As to the statutory power to appoint a receiver see PARA 476.

2 See PARA 560 et seq.

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(iv) Rights of the Mortgagee in Possession

A. RIGHT TO RENT AND BENEFIT OF COVENANTS

417. When mortgagee becomes entitled.

So long as the mortgagee allows the mortgagor to remain in possession, the mortgagor, if in occupation, takes the profits of the land and, if the property is let, takes the rents, in either case for his own use and without liability to account to the mortgagee¹. The mortgagee,

however, on going into possession is entitled to take the rents and profits by virtue of the legal or equitable ownership which the mortgage confers upon him².

1 *Trent v Hunt* (1853) 9 Exch 14 at 22. See also PARAS 338-340, 431.

2 See *Cockburn v Edwards* (1881) 18 ChD 449 at 457, CA. In relation to tenancies granted on or after 1 January 1996, a mortgagee in possession can enforce any covenant or any right of re-entry enforceable by the mortgagor: see the Landlord and Tenant (Covenants) Act 1995 s 15(1). As to rights to crops on agricultural holdings see **AGRICULTURAL LAND** vol 1 (2008) PARA 369.

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418. Rent from tenancies binding on mortgagee.

As regards tenancies created before the mortgage or created by the mortgagor after the mortgage under an express or statutory power¹, the mortgagee, as he is entitled to the reversion, may require payment to himself of all arrears of rent existing when he goes into possession². He is entitled to arrears of rent, whether falling due before or after the mortgage was granted, and the claim of the mortgagee will prevail over the claim of persons to whom the rents have been assigned by the mortgagor³. The mortgagee can recover also an increased rent which the tenant has agreed with the mortgagor to pay after the date of the mortgage⁴. The rule is restricted to rents proper; it does not extend, in a mortgage of warehouses, to charges for warehousing goods, even though called rents, and recoverable by statute by distraint and sale of the goods⁵, or to freight⁶. A mortgagee is not bound by a collateral agreement between the mortgagor and a lessee under a lease created before 1 January 1996 and before the mortgage⁷, but if he takes his mortgage with knowledge that the land is used for a particular purpose, he cannot object to that user⁸. A tenant cannot set off a claim for damages against a mortgagor against a mortgagee's claim for rent⁹.

1 As to the mortgagor's power to grant leases see PARA 345 et seq.

2 As to tenancies granted before 1 January 1996 see the Law of Property Act 1925 s 141(3); and PARA 423. See also *London and County (A & D) Ltd v Wilfred Sportsman Ltd (Greenwoods (Hosiery and Outfitters) Ltd, third party)* [1971] Ch 764, [1970] 2 All ER 600, CA; *Kataria v Safeland plc* (1997) 75 P & CR D30, [1998] 1 EGLR 39, CA. As to tenancies granted on or after 1 January 1996 see the Landlord and Tenant (Covenants) Act 1995 s 15(1); and PARA 417. As to the mortgagor's right to rent while in possession see PARAS 339-340. See also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 570.

3 *Re Ind, Coope & Co Ltd, Fisher v Ind, Coope & Co Ltd, Knox v Ind, Coope & Co Ltd, Arnold v Ind, Coope & Co Ltd* [1911] 2 Ch 223. See also *Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd* [1989] 1 All ER 1161, [1989] 1 WLR 800, CA.

4 *Burrowes v Gradin* (1843) 1 Dow & L 213. See also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 246.

5 *Anderson v Butler's Wharf Co Ltd* (1879) 48 LJCh 824.

6 *Rusden v Pope* (1868) LR 3 Exch 269 at 275.

7 *Thomas v Jennings* (1896) 66 LJQB 5. In relation to tenancies granted on or after 1 January 1996, a mortgagee in possession is bound by a covenant that fails to be complied with by the landlord even if contained in a collateral agreement: see the Landlord and Tenant (Covenants) Act 1995 s 15(3).

8 *Moreland v Richardson* (1857) 24 Beav 33.

9 *Reeves v Pope* [1914] 2 KB 284, CA.

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419. Rent from tenancies not binding on mortgagee.

Where after the mortgage a tenancy is created which is not binding on the mortgagee¹, he is not entitled to demand payment of the rents as such, but after notice from him to the tenants to pay the rents to him they must not pay rents to the mortgagor, and they are justified in paying the rents to the mortgagee, as otherwise, on recovering possession, he would be entitled to recover the rents as mesne profits². Technically, the claim for mesne profits is for trespass and requires that the mortgagee is to have been in possession during the time for which mesne profits are claimed³, but on entry by the mortgagee or judgment and possession taken his possession relates back to the date of the mortgage⁴, and he can recover the rent accrued due within six years⁵ during that period⁶. The mortgagee may include a claim for mesne profits in his claim for recovery of possession of land⁷, and he will be allowed to prove when his title to possession accrued, and to recover from the tenant the rents, accrued within six years before proceedings, which have not been paid to the mortgagor.

1 See PARA 293 et seq.

2 *Pope v Biggs* (1829) 9 B & C 245 at 257; *Wyse v Myers* (1854) 4 ICLR 101; *Underhay v Read* (1887) 20 QBD 209, CA. See also *Rusden v Pope* (1868) LR 3 Exch 269 at 275. As to mesne profits see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 285.

3 *Turner v Cameron's Coalbrook Steam Coal Co* (1850) 5 Exch 932.

4 See PARA 398.

5 As to the six-year limitation period applicable to the recovery of arrears of rent see **LIMITATION PERIODS** vol 68 (2008) PARA 1033.

6 *Barnett v Earl of Guildford* (1855) 11 Exch 19 (overruling *Litchfield v Ready* (1850) 5 Exch 939); *Ocean Accident and Guarantee Corp'n Ltd v Ilford Gas Co* [1905] 2 KB 493 at 498, CA. See also *Harris v Mulkern* (1875) 1 ExD 31.

7 *Dunlop v Macedo* (1891) 8 TLR 43. See also *Brandreth v Shears* [1883] WN 89.

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420. Right where rent paid is advance to mortgagor.

If the tenant has paid rent to the mortgagor before it was due, this is not a good payment against the mortgagee as regards rent accruing due after notice of the mortgage has been given to the tenant, and the tenant is liable to pay that rent over again to the mortgagee¹; but if before the mortgage the tenant has paid a lump sum in satisfaction of all rents accruing

during the term, and the mortgagee makes no inquiry of the tenant, he is bound by this payment².

1 *De Nicholls v Saunders* (1870) LR 5 CP 589; *Cook v Guerra* (1872) LR 7 CP 132; *Lord Ashburton v Nocton* [1915] 1 Ch 274 at 282, CA; *Smallman Ltd v Castle* [1932] IR 294.

2 *Green v Rheinberg* (1911) 104 LT 149, CA.

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421. Rents in hands of receiver.

Where a receiver has been appointed by the court, the mortgagee may obtain possession by applying for his discharge¹. Whether rents then received by and remaining in the receiver's hands belong to the mortgagee or not depends on the object of the receiver's appointment². If he has been appointed in proceedings only affecting the title to the equity of redemption, for example, in proceedings to administer the trusts of the mortgagor's will³, or in other proceedings in which the mortgagee's title is not in question⁴, the mortgagee is not entitled to past rents, but only to rents paid after he applied to discharge the receiver⁵. Where a mortgagee has let the mortgagor remain in possession and rents are received by the receiver appointed in a debenture holders' claim to which the mortgagee is not a party, any rents which as between the parties to the claim turn out to have been received for the mortgagor will not be paid over by the receiver to the mortgagee⁶. If, however, the receiver is appointed on behalf of incumbrancers on the property generally, or to settle a dispute as to title in which the mortgagee is interested, the mortgagee is entitled to rents in the receiver's hands⁷; and where sequestrators have been appointed, the mortgagee is entitled to rents received by the sequestrators and remaining in their hands when he makes his claim⁸.

1 See PARAS 340, 409. As to a mortgagee's right to possession where his rights have been expressly preserved by the order appointing the receiver see PARA 564.

2 *Re Hoare, Hoare v Owen* [1892] 3 Ch 94 at 103. See also *Re Metropolitan Amalgamated Estates Ltd, Fairweather v Metropolitan Amalgamated Estates Ltd* [1912] 2 Ch 497 at 503.

3 *Thomas v Brigstocke* (1827) 4 Russ 64.

4 *Gresley v Adderley, Gresley v Heathcoat* (1818) 1 Swan 573 at 579. See also *Bertie v Earl of Abingdon* (1817) 3 Mer 560.

5 I.e. after the date of service of his application: *Preston v Tunbridge Wells Opera House Ltd* [1903] 2 Ch 323. See also *Re Metropolitan Amalgamated Estates Ltd, Fairweather v Metropolitan Amalgamated Estates Ltd* [1912] 2 Ch 497 at 502.

6 *Re Lands Securities Co, ex p Norwich Life Insurance Society* (1894) 13 R 48.

7 *Gresley v Adderley, Gresley v Heathcoat* (1818) 1 Swan 573; *Re Hoare, Hoare v Owen* [1892] 3 Ch 94.

8 See PARA 340.

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PROPERTY/(iv) Rights of the Mortgagee in Possession/A. RIGHT TO RENT AND BENEFIT OF COVENANTS/422. Application of rents received by mortgagee.

422. Application of rents received by mortgagee.

The rents received by a mortgagee in possession are applicable in the first instance in paying the current outgoings such as rents, rates and taxes, repairs, insurance premiums and the interest on prior incumbrances¹. The balance is then applicable, first, in payment of interest on the mortgage debt, and on expenses of improvements and otherwise, which the mortgagee is entitled to add to principal; and, secondly, in payment of the principal and of capital expenditure added to principal². The mortgagee is not restricted to paying his interest out of the rents unless special provision to that effect is made by the mortgage deed³. The mode in which the rents are thus applied depends on whether the accounts are taken with or without rests⁴.

1 As to the application of money received by a mortgagee's receiver see the Law of Property Act 1925 s 109(8); and PARA 483. See also *Bompas v King* (1886) 33 ChD 279, CA.

2 See the order in *Webb v Rorke* (1806) 2 Sch & Lef 661 at 676.

3 *Re Betts, ex p Harrison* (1881) 18 ChD 127 at 136, CA; *Re Knight, ex p Isherwood* (1882) 22 ChD 384 at 392, CA.

4 See PARA 718.

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423. Right to benefit of covenants.

A mortgagee of premises subject to a lease granted before 1 January 1996¹ is entitled to enforce and take advantage of covenants having reference to the subject matter of a lease given by the lessee and rights of re-entry². The mortgagee can also re-enter for breaches of covenant committed since the mortgage, and breaches of covenant committed before the mortgage unless they had been waived or released at the time of the mortgage³. A mortgagee in possession of leasehold premises is entitled to the benefit of covenants by the lessor which touch and concern the land⁴.

A mortgagee in possession of premises subject to a lease granted on or after 1 January 1996 can enforce any tenant covenant⁵ or right of re-entry which is enforceable by the mortgagor⁶. A landlord covenant⁷ which is enforceable against a landlord is also enforceable by a mortgagee in possession of the tenant's interest⁸.

1 ie the commencement date of the Landlord and Tenant (Covenants) Act 1995.

2 See the Law of Property Act 1925 s 141(1), (2); Landlord and Tenant (Covenants) Act 1995 s 30(4). See also *Greenaway v Hart* (1854) 14 CB 340; *Yellowly v Gower* (1855) 11 Exch 274; *Municipal Permanent Investment Building Society v Smith* (1888) 22 QBD 70, CA. As to the rights of a mortgagor in possession see PARA 338 et seq.

3 See the Law of Property Act 1925 s 141(3); Landlord and Tenant (Covenants) Act 1995 s 30(4).

4 *Spencer's Case* (1583) 5 Co Rep 16a. See also the Law of Property Act 1925 s 78; and **EQUITY** vol 16(2) (Reissue) PARA 618; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 566.

5 'Tenant covenant', in relation to a tenancy, means a covenant falling to be complied with by the tenant of premises demised by the tenancy: see the Landlord and Tenant (Covenants) Act 1995 s 28(1).

6 See the Landlord and Tenant (Covenants) Act 1995 s 15(1). This right appears to extend to rent in arrears and existing breaches. See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 592.

7 'Landlord covenant', in relation to a tenancy, means a covenant falling to be complied with by the landlord of premises demised by the tenancy: see the Landlord and Tenant (Covenants) Act 1995 s 28(1).

8 See the Landlord and Tenant (Covenants) Act 1995 s 15(3). For these purposes, 'mortgagee' includes a chargee: see s 15(6). See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 592.

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B. CONDUCT OF BUSINESS

424. Mortgagee's power to carry on business.

Where the mortgage security includes a business carried on upon the mortgaged premises¹, the mortgagee on entering is entitled to carry on the business for a reasonable time with a view to sale². The mortgagee would, however, normally appoint a receiver to carry on the business³ or apply to the court for an appointment of a receiver and manager⁴.

1 As to whether the mortgage includes the business see *Whitley v Challis* [1892] 1 Ch 64, CA; *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA; *Re Leas Hotel Co, Salter v Leas Hotel Co* [1902] 1 Ch 332; *Leney & Sons Ltd v Callingham and Thompson* [1908] 1 KB 79, CA; and see *Re Bennett, Clarke v White* [1899] 1 Ch 316. As to goodwill see PARA 198.

2 *Cook v Thomas* (1876) 24 WR 427.

3 See PARA 475 et seq.

4 See PARA 560.

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425. Liabilities and powers of mortgagee carrying on business.

By carrying on the business the mortgagee does not render himself liable on the existing contracts of the business unless he adopts them so as to effect a novation¹, but he is personally liable on any new contracts into which he enters². He becomes owner of the business, and stands, as regards his powers, in the mortgagor's place³. The power may be exercised although the consequences are disadvantageous to the mortgagor⁴. The mortgagee is not, however, obliged to appoint a receiver to run the business, nor is he under any duty to preserve the goodwill prior to taking possession⁵. A receiver owes more extensive duties⁶.

1 As to novation see **CONTRACT** vol 9(1) (Reissue) PARA 1036 et seq. It seems that the entry by the mortgagee normally operates as a dismissal of the employees employed in the business: *Reid v Explosives Co Ltd* (1887) 19 QBD 264 at 267, 269, CA. As to the position where the court appoints a receiver and manager of a company's business see **COMPANIES** vol 15 (2009) PARA 1372 et seq.

2 Cf *Burt, Boulton and Hayward v Bull* [1895] 1 QB 276, CA.

3 *Chaplin v Young* (1864) 33 Beav 330 at 337.

4 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC.

5 *AIB Finance Ltd v Debtors* [1998] 2 All ER 929, [1998] 1 BCLC 665, CA. As to goodwill generally see **PARTNERSHIP** vol 79 (2008) PARA 213 et seq; **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1206 et seq; **COMPETITION** vol 18 (2009) PARAS 373-376. As to the duties of a mortgagee who does decide to carry on a business see PARA 427 et seq.

6 See PARA 479.

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C. LEASING POWERS OF THE MORTGAGEE IN POSSESSION

426. Mortgagee's leasing powers.

A mortgagee who is in possession¹, or who has appointed a receiver of the rents and profits of the mortgaged property², has the same statutory powers of leasing and accepting surrenders of leases as are enjoyed by a mortgagor in possession³. A lease by the mortgagee not made under the statutory power or under any express power contained in the mortgage deed or with the mortgagor's consent⁴ is not binding on the mortgagor after redemption⁵. Consequently, where the lease is not made under the statutory power, nor under an express power of leasing, both mortgagor and mortgagee should concur to grant it⁶. The lease operates then as a demise by the mortgagee and confirmation by the mortgagor⁷. The lease should treat the mortgagee as the actual lessor⁸.

1 See the Law of Property Act 1925 ss 99(2), 100(2); and PARAS 346, 352. See also *Berkshire Capital Funding Ltd v Street* (1999) Times, 27 May, CA.

2 See the Law of Property Act 1925 ss 99(19), 100(13); and PARAS 346, 352.

3 As to these powers see PARA 346 et seq.

4 The consent need not be under seal in order to render the lease binding on the mortgagor: *Chapman v Smith* [1907] 2 Ch 97 at 102. A lease granted by the mortgagee is binding on a purchaser from the mortgagee: *Chapman v Smith* above at 103.

5 *Franklin v Ball* (1864) 33 Beav 560. It may, perhaps, be otherwise where the granting of the lease was urgent: *Hungerford v Clay* (1722) 9 Mod Rep 1 at 2.

6 *Doe d Barney v Adams* (1832) 2 Cr & J 232; cf *Smith v Pocklington* (1831) 1 Cr & J 445.

7 *Doe d Barney v Adams* (1832) 2 Cr & J 232; cf *Smith v Pocklington* (1831) 1 Cr & J 445.

8 See *Webb v Russell* (1789) 3 Term Rep 393; *Saunders v Merryweather* (1865) 3 H & C 902.

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(v) Liabilities of the Mortgagee in Possession

A. IN GENERAL

427. General duties.

A mortgagee who goes into possession becomes the manager of the charged property¹. He thereby assumes a duty to take reasonable care of the property². This requires him to be active in protecting and exploiting the security, maximising the return, but without taking undue risks³.

¹ *Kendle v Melsom* (1998) 193 CLR 46, Aust HC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

² *Downsview Nominees Ltd v First City Corp'n Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484.

³ *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

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B. LIABILITY TO ACCOUNT

428. Wilful default account.

A mortgagee who goes into possession of the mortgaged property, and thereby excludes the mortgagor from control of it, is bound to account to the mortgagor, not only for the rents and profits which he actually receives, but also for the rents and profits which, but for his wilful default or neglect, he might have received¹; that is, for everything which he has received, or might or ought to have received, while he continued in possession². The usual form of order is for an account of the rents and profits of the hereditaments comprised in the mortgage received by the mortgagee, or by any other person for the order or use of the mortgagee, or which, without the mortgagee's wilful default, might have been so received³. The rule as to the footing on which accounts are to be taken applies both to tangible property and to the goodwill of a business⁴, and not only to rents and profits, such as the rents and profits of land, or the profits of a business⁵, but also to the corpus of the mortgaged property. It seems that, where stock is mortgaged, and the mortgagee makes a profit by selling and repurchasing, he must account for this⁶.

A co-owner of a patent who is also mortgagee of the share of another co-owner, while bound to account to his mortgagor for royalties, need not account for the profits derived from his own use of the patent, as he is entitled to this use as co-owner⁷.

If the assignee of a judgment debt issues execution on it, thereby in effect going into possession, but omits to proceed with the execution and the debt is lost, he must account for it⁸. So, also, an assignee of a debt who is empowered to sue for it but fails to do so must account for any loss incurred by his forbearance⁹, but this principle does not apply to a mere equitable assignee¹⁰. Where a lease is forfeited through the mortgagee's default, he is liable in respect of the forfeiture¹¹. An account against a mortgagee in possession who has sold the mortgaged property is on the footing of wilful default¹².

The rule as to the footing on which accounts are to be taken is based on the principle that, as the property is only a security for the money, the mortgagee must be diligent in realising the amount due in order that he may restore the property to the mortgagor¹³. He does not, however, account for profits arising from business done in connection with the mortgaged premises which do not arise from the premises¹⁴. The duties owed by the mortgagee are equitable, and cannot be replaced or supplemented by a liability in negligence¹⁵.

1 *Hughes v Williams* (1806) 12 Ves 493; *Quarrell v Beckford* (1816) 1 Madd 269 at 274; *Rowe v Wood* (1822) 2 Jac & W 553 at 556; *Williams v Price* (1824) 1 Sim & St 581 at 587; *Parkinson v Hanbury* (1867) LR 2 HL 1 at 14; *National Bank of Australasia v United Hand-in-Hand and Band of Hope Co* (1879) 4 App Cas 391 at 409, PC; *Gaskell v Gosling* [1896] 1 QB 669 at 691, CA. There is an early decision to the contrary: *Anon* (1675) 1 Cas in Ch 258. As to accounts between mortgagee and mortgagor generally see PARA 705 et seq.

2 *Chaplin v Young* (1864) 33 Beav 330 at 337.

3 See the note to *Harnard v Webster* (1725) Cas temp King (2nd Edn) 53. See also PARAS 593 et seq, 714 et seq.

4 *Mayer v Murray* (1878) 8 ChD 424. As to goodwill generally see **PARTNERSHIP** vol 79 (2008) PARA 213 et seq; **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1206 et seq; **COMPETITION** vol 18 (2009) PARAS 373-376.

5 *Chaplin v Young* (1864) 33 Beav 330.

6 *Langton v Waite* (1868) LR 6 Eq 165; revsd on another point (1869) 4 Ch App 402.

7 *Steers v Rogers* [1892] 2 Ch 13, CA (affd [1893] AC 232, HL); cf *Heyl Dia v Edmunds* (1899) 48 WR 167.

8 *Williams v Price* (1824) 1 Sim & St 581 at 587.

9 *Ex p Mure* (1788) 2 Cox Eq Cas 63 at 75.

10 *Glyn v Hood* (1860) 1 De G F & J 334 at 348.

11 *Perry v Walker* (1855) 3 Eq Rep 721.

12 *Mayer v Murray* (1878) 8 ChD 424; *National Bank of Australasia v United Hand-in-Hand and Band of Hope Co* (1879) 4 App Cas 391 at 409, PC.

13 *Lord Kensington v Bouverie* (1855) 7 De GM & G 134 at 157; and see *Sherwin v Shakespear* (1854) 5 De GM & G 517 at 536.

14 *White v City of London Brewery Co* (1889) 42 ChD 237, CA (mortgagees' profits as brewers from sale of beer to tenant to whom they had let the premises).

15 *Downsview Nominees Ltd v First City Corp'n Ltd* [1993] AC 295, [1993] 3 All ER 626, PC.

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429. How far the rule applies.

The mortgagee accounts on the same footing to all persons interested in the equity of redemption, and remains liable to account notwithstanding that he has assigned the mortgage¹, unless he has assigned it under court order². The rule as to the footing on which a mortgagee must account³ applies, however, only when the mortgagee enters in his character as mortgagee, so that he knows that he is in possession and chargeable accordingly⁴. Thus a mortgagee in occupation as tenant does not account as mortgagee in possession⁵, but, where a tenancy is created in favour of the mortgagee after a second mortgage, the prior mortgagee accounts as mortgagee in possession to the second mortgagee⁶. A person, therefore, who enters as a purchaser and who, on the sale going off, has a lien for purchase money which he has paid is not liable to account as mortgagee in possession⁷. A vendor in possession with a lien for the unpaid purchase money is not ordinarily chargeable as a mortgagee in possession⁸, although he may become so chargeable by insisting on retaining possession when he might properly give it up⁹. A mortgagee can escape the liabilities of a mortgagee in possession by entering as agent for a prior incumbrancer, but not, it seems, as agent for the mortgagor¹⁰. The mortgagee must account notwithstanding that the agent who received the rents for him is dead¹¹.

1 *Hinde v Blake* (1841) 11 LJCh 26; *Hall v Heward* (1886) 32 ChD 430, CA. See also *Venables v Foyle* (1661) 1 Cas in Ch 2.

2 *Hall v Heward* (1886) 32 ChD 430, CA. The rule as to the footing on which a mortgagee must account was applied to a mortgage by way of trust for sale, and the mortgagee accounted as mortgagee in possession from the time when he entered into possession, but not before: *Beare v Prior* (1843) 6 Beav 183. The mortgagee accounted as such and not as trustee: *Chambers v Goldwin* (1801) 5 Ves 834 at 837; on appeal (1804) 9 Ves 254. As to these mortgages see *Re Alison, Johnson v Mounsey* (1879) 11 ChD 284, CA; *Re Metropolis and Counties Permanent Investment Building Society, Gatfield's Case* [1911] 1 Ch 698. A legal mortgage in this form cannot now be made as a mortgage of land by conveyance or trust for sale now takes effect as a mortgage by demise: see the Law of Property Act 1925 s 85(2), (3) (amended by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (6)); and PARA 187. As to a trustee's liability to account see **TRUSTS** vol 48 (2007 Reissue) PARA 1109. A trust for sale is now referred to as a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 1; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 66.

3 See PARA 428.

4 *Parkinson v Hanbury* (1867) LR 2 HL 1 at 14.

5 *Page v Linwood* (1837) 4 Cl & Fin 399 at 434, HL; cf *Morony v O'Dea* (1809) 1 Ball & B 109 at 117. A mortgagee of the inheritance who was in possession as purchaser of the life estate did not account as a mortgagee in possession: *Whitbread v Smith* (1854) 3 De GM & G 727 at 741; cf *Lord Kensington v Bouverie* (1855) 7 De GM & G 134 at 144; and see *Blennerhassett v Day* (1812) 2 Ball & B 104 at 125.

6 *Gregg v Arrott* (1835) L & G temp Sugd 246.

7 *Parkinson v Hanbury* (1867) LR 2 HL 1 at 14 (where, however, the contrary decision in *Adams v Swarder* (1864) 2 De GJ & Sm 44 at 60 was not mentioned).

8 *Sherwin v Shakespear* (1854) 5 De GM & G 517.

9 *Phillips v Silvester* (1872) 8 Ch App 173. See also **EQUITY** vol 16(2) (Reissue) PARAS 611-612; **LIEN** vol 68 (2008) PARA 855 et seq.

10 *Refuge Assurance Co Ltd v Pearlberg* [1938] Ch 687, [1938] 3 All ER 231, CA.

11 *Noyes v Pollock* (1885) 30 ChD 336, CA.

PROPERTY/(v) Liabilities of the Mortgagee in Possession/B. LIABILITY TO ACCOUNT/430.
Amount charged when property let or unlet.

430. Amount charged when property let or unlet.

Where the mortgaged property is let at the time of the mortgagee taking possession, he is charged with the rents at the rate reserved¹, if he could with due diligence have recovered them². A mortgagee must use the usual means to recover the rents if they are likely to prove effectual³, but he is not bound to distrain on goods of a stranger which may be on the demised premises⁴. When the property is not let, he must use due diligence to let it⁵, and, if it remains unlet through his default, he is charged with the rents which ought to have been obtained. The mortgagee is under no duty to let the property if a letting might hinder or interfere with an intended sale of the property⁶. It has been said that the rent obtained will be deemed to be the same throughout the time during which the mortgagee is in possession, unless he shows to the contrary⁷. The burden of proving wilful default is, in the first instance, on the person alleging it, but if he shows that the premises were capable of being let and were left vacant the burden is shifted, and the mortgagee must prove that no tenant could be obtained⁸. If resident at a distance, the mortgagee is justified in acting on an agent's advice as to letting the property⁹. If the mortgagor is a party to any act to prevent the letting, this is an answer to the charge of wilful default¹⁰; if he knows that the property is let at an undervalue, he should give notice of the fact to the mortgagee¹¹ unless the mortgagee already knows that a better rent could be obtained¹². If by obtaining an advantage for himself¹³, or by underhand dealing with the tenant¹⁴, or by wantonly changing the tenant¹⁵, the mortgagee lets the property at less than the full rent, he is charged with the full rent. Similarly, if the mortgagee turns out or refuses to accept a suitable tenant he is chargeable with the rent which he might have received¹⁶.

If the mortgagee goes into actual occupation himself¹⁷, he will be charged with a fair occupation rent¹⁸, but he is not to be charged a higher rent on account of improvements effected by himself, unless he is allowed the expense of the improvements¹⁹. Unless the mortgagee admits occupation, an inquiry will be directed²⁰. The mortgagee is not chargeable with an occupation rent on the ground that on selling the property he has let the purchaser into possession before the date for completion²¹.

It has been said that the mortgagee is charged with the utmost value the property is proved to be worth²², but it seems that this statement is too wide; if the mortgagee occupies under a lease from the mortgagor, he is chargeable only with the rent reserved if the amount is proper, notwithstanding that the lease is set aside²³.

The mortgagee is not liable for rent while the property, from its ruinous condition or otherwise, is incapable of beneficial occupation²⁴.

1 *Lord Trimleston v Hamill* (1810) 1 Ball & B 377 at 385.

2 *Noyes v Pollock* (1886) 32 ChD 53 at 61, CA. See also *Brandon v Brandon* (1862) 10 WR 287.

3 *Duke of Bucks v Gayer* (1684) 1 Vern 258.

4 *Cocks v Gray* (1857) 1 Giff 77. For restrictions on the right of distress see **DISTRESS** vol 13 (2007 Reissue) PARA 920.

5 *Blacklock v Barnes* (1725) Cas temp King 53.

6 See *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Huish v Ellis* [1995] BCC 462, [1995] NPC 3. A mortgagee is entitled to choose when to sell the property and is not obliged to exercise other powers in the meantime: *Kennedy v General Credits* (1982) 2 BPR 9456.

7 *Metcalf v Campion* (1828) 1 Mol 238; *Brandon v Brandon* (1862) 10 WR 287.

- 8 *Brandon v Brandon* (1862) 10 WR 287.
- 9 *Brandon v Brandon* (1862) 10 WR 287.
- 10 *Metcalfe v Campion* (1828) 1 Mol 238.
- 11 *Hughes v Williams* (1806) 12 Ves 493.
- 12 *Shepherd v Spanheath Ltd* [1988] EGCS 35, CA.
- 13 *White v City of London Brewery Co* (1889) 42 ChD 237, CA, where brewers who were mortgagees let a public house with a tied house covenant.
- 14 *Metcalfe v Campion* (1828) 1 Mol 238.
- 15 *Hughes v Williams* (1806) 12 Ves 493.
- 16 *Anon* (1682) 1 Vern 45.
- 17 See *Trulock v Robey* (1846) 15 Sim 265 at 273; *Shepard v Jones* (1882) 21 ChD 469 at 475, CA.
- 18 *Metcalfe v Campion* (1828) 1 Mol 238; *Fee v Cobine* (1847) 11 I Eq R 406 at 410; *Marriott v Anchor Reversionary Co Ltd* (1861) 3 De GF & J 177 at 193. See also *Fyfe v Smith* [1975] 2 NSWLR 408.
- 19 *Bright v Campbell* (1885) 54 LJCh 1077, CA.
- 20 3 Seton's Form of Decrees, Judgments and Orders (7th Edn, 1912) 1887.
- 21 *Shepard v Jones* (1882) 21 ChD 469, CA.
- 22 *Lord Trimleston v Hamill* (1810) 1 Ball & B 377 at 385.
- 23 *Gubbins v Creed* (1804) 2 Sch & Lef 214 at 224; *Webb v Rorke* (1806) 2 Sch & Lef 661 at 674.
- 24 *Marshall v Cave* (1824) 3 LJOS Ch 57.

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431. Liability to subsequent incumbrancer.

If he has surplus rents in hand after satisfying his interest, a mortgagee can pay them to the mortgagor, provided that he has received no notice of any subsequent incumbrance, and neither he nor the mortgagor is liable to account for them to a subsequent incumbrancer¹. This is in accordance with the rule that the mortgagor is not bound to account for rents which the mortgagee allows him to receive². The rule applies to a mortgage for a term³ and of a life estate⁴, and notwithstanding that a receiver is in possession appointed otherwise than on the mortgagee's behalf⁵. It applies also to receipt by the mortgagor's trustee in bankruptcy, unless he has retained the rents in violation of an agreement to apply them in payment of interest⁶. However, once the mortgagee has notice of a subsequent incumbrance entitling the subsequent incumbrancer to the rents and profits, he will be liable to the subsequent incumbrancer for any surplus rents paid to the mortgagor⁷. The taking by a second incumbrancer of proceedings to which the first mortgagee is made a party for the purpose of enforcing the second incumbrancer's security amounts to notice to the first mortgagee of the second incumbrancer's right to receive surplus rents⁸.

Where separate properties subject to separate mortgages are included in the same lease, the rent is apportioned between the two mortgagees notwithstanding that by error the whole has been reserved to one of them⁹.

- 1 See PARA 340. See also *Drummond v Duke of St Albans* (1800) 5 Ves 433 at 438.
- 2 See PARA 340. See also *Drummond v Duke of St Albans* (1800) 5 Ves 433 at 438.
- 3 *Gresley v Adderley, Gresley v Heathcoat* (1818) 1 Swan 573 at 579.
- 4 *Colman v Duke of St Albans* (1796) 3 Ves 25.
- 5 *Flight v Camac* (1856) 25 LJCh 654.
- 6 *Ex p Calwell* (1828) 1 Mol 259.
- 7 *Berney v Sewell* (1820) 1 Jac & W 647 at 650; *Archdeacon v Bowes* (1824) 13 Price 353 at 368. See also *Maddocks v Wren* (1680) 2 Rep Ch 209; *Holton v Lloyd* (1827) 1 Mol 30 at 31; *Clark v Cook* (1849) 3 De G & Sm 333 at 336.
- 8 *Parker v Calcraft* (1821) 6 Madd 11 at 12. The taking of those proceedings by the second incumbrancer amounts to the taking of equitable possession: *Parker v Calcraft* at 12. As to the principle that the second incumbrancer, where he has a legal mortgage, is entitled to take actual possession subject to the first mortgagee's rights see PARA 402.
- 9 *Harryman v Collins* (1854) 18 Beav 11.

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C. LIABILITY UNDER COVENANTS

432. Leasehold covenants.

In relation to leases granted before 1 January 1996, the relationship of lessor and lessee is not affected by a mortgage, so that the lessee remains liable to perform the covenants whether or not a mortgagee takes possession¹.

In relation to tenancies granted on or after 1 January 1996, where any landlord covenant² of a tenancy is enforceable against the reversioner in respect of any premises demised by the tenancy, it is also enforceable against either any person (other than the reversioner) who, as the holder of the immediate reversion in those premises, is for the time being entitled to the rents and profits under the tenancy in respect of those premises, or any mortgagee in possession of the reversion in those premises who is so entitled³. Any landlord covenant of a tenancy which is enforceable by the tenant in respect of any premises demised by the tenancy is also enforceable by any mortgagee in possession of those premises under a mortgage granted by the tenant⁴. Any tenant covenant⁵ of a tenancy, or right of re-entry contained in a tenancy, which is enforceable against the tenant in respect of any premises demised by the tenancy is also enforceable against any mortgagee in possession of the tenant's interest⁶. Covenants which are expressed to be personal or are unenforceable for non-registration are not enforceable against a mortgagee in possession⁷.

1 *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161; *Smith v Spaul* [2002] EWCA Civ 1830, [2003] QB 983, [2003] 1 All ER 509. However, cf the Law of Property Act 1925 s

142(1); *Wilson v Queen's Club* [1891] 3 Ch 522; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 571. Cf *Municipal Permanent Investment Building Society v Smith* (1888) 22 QBD 70, CA. As to the benefit of covenants see PARA 423. As to the transmission of the burden of covenants see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 571.

2 As to the meaning of 'landlord covenant' see PARA 423 note 7.

3 See the Landlord and Tenant (Covenants) Act 1995 s 15(1)(a), (b), (2).

4 Landlord and Tenant (Covenants) Act 1995 s 15(3). 'Mortgagee' includes chargee: see s 15(6).

5 As to the meaning of 'tenant covenant' see PARA 423 note 5.

6 See the Landlord and Tenant (Covenants) Act 1995 s 15(4).

7 See the Landlord and Tenant (Covenants) Act 1995 s 15(5) (amended by the Land Registration Act 2002 s 133, Sch 11 para 33(1), (2)).

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433. Freehold covenants.

The burden of a positive covenant does not run with the land so as to bind a mortgagee¹, but the burden of a restrictive covenant is in certain circumstances enforceable in equity against successors in title of a covenantor².

1 A mortgagee who seeks to take the benefit of a deed may be liable to assume the burdens under it: *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.

2 See **EQUITY** vol 16(2) (Reissue) PARA 618.

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D. LIABILITY TO EXECUTE REPAIRS

434. Extent of liability.

The mortgagee's liability to keep the mortgaged premises in repair depends on the considerations that by taking possession he has excluded the mortgagor from control of the property, and that the rents are the proper fund out of which to provide for repairs. The mortgagee is not, however, judged by the degree of care which a person would take of his own property. He is chargeable in respect of gross negligence¹; and if his default may cause a forfeiture of leasehold property, he is bound to act as a provident owner and to do what is necessary to prevent the forfeiture². He must, at any rate to the extent of surplus rents in his hands after the interest due on his mortgage is satisfied, do such repairs as are required to maintain the premises in a proper state of preservation³. On a prima facie case being made out, an inquiry as to deterioration will be directed⁴.

The mortgagee is not bound, however, to keep the premises in as good repair as that in which he found them, and when he has done ordinary repairs he will not be charged with deterioration due to the lapse of time⁵; nor, where the buildings are in such a state that a prudent owner would pull them down and rebuild, is the mortgagee bound to do this⁶. The mortgagee must not pull down buildings⁷ except to substitute new buildings for decayed old buildings without changing their purpose⁸.

1 *Wragg v Denham* (1836) 2 Y & C Ex 117; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

2 *Perry v Walker* (1855) 3 Eq Rep 721. As to depreciation of a ship owing to improper working by mortgagees see *Marriott v Anchor Reversionary Co Ltd* (1861) 3 De GF & J 177.

3 *Richards v Morgan* (1753) 4 Y & C Ex 570 (Appendix); and see *Moore v Painter* (1842) 6 Jur 903.

4 Cf *Batchelor v Middleton* (1848) 6 Hare 75 at 85, where an inquiry was directed whether the mortgagee, to the damage and injury of the mortgagor, had allowed buildings to fall down.

5 *Russel v Smithies* (1794) 1 Anst 96; *Wragg v Denham* (1836) 2 Y & C Ex 117.

6 *Moore v Painter* (1842) 6 Jur 903.

7 *Sandon v Hooper* (1843) 6 Beav 246.

8 *Marshall v Cave* (1824) 3 LJOs Ch 57. As to insurance by the mortgagee see PARA 227.

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435. Extent of repair authorised.

The mortgagee must not burden the equity of redemption so as to make it more difficult for the mortgagor to redeem, and on redemption he must be able to hand back the property as far as possible in its original condition. The mortgagee must not improve the mortgagor out of his estate¹. Hence, he must not make a large outlay on permanent improvements unless he obtains the mortgagor's consent, or unless the mortgagor, after notice, acquiesces², nor may he change the character of the property, even though such change constitutes an improvement³, but he may make reasonable improvements without notice to the mortgagor⁴. On the other hand, the mortgagee is not bound to rebuild or to lay out large sums beyond the rent, for this would be to lend more money upon, perhaps, a deficient security⁵. Expenditure properly made is allowed to the mortgagee in his accounts⁶.

1 *Sandon v Hooper* (1843) 6 Beav 246.

2 *Sandon v Hooper* (1843) 6 Beav 246; *Shepard v Jones* (1882) 21 ChD 469 at 479, CA; cf *Gubbins v Creed* (1804) 2 Sch & Lef 214 at 227. Mere notice does not affect the mortgagor if he does nothing; there must be some specific sign of acquiescence: *Shepard v Jones* at 479.

3 *Moore v Painter* (1842) 6 Jur 903; *Bright v Campbell* (1885) 54 LJCh 1077, CA.

4 *Shepard v Jones* (1882) 21 ChD 469 at 479, CA.

5 *Richards v Morgan* (1753) 4 Y & C Ex 570 (Appendix).

6 See PARA 745.

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E. LIABILITY FOR WASTE

436. General rule.

A mortgagee who formerly took the legal estate in fee simple became the absolute owner at law, and hence could not in strictness commit waste¹, and a mortgage by demise under the present law² is expressed to be without impeachment of waste³. In equity the mortgagee is subject to the rule that he must on redemption give back the property unimpaired, and, therefore, unless his security is deficient, he may not destroy any part of the inheritance; if he does so, he must make good the loss to the mortgagor in taking the accounts⁴.

1 As to the mortgagor's liability for waste see PARAS 358-359.

2 See PARAS 190-191. For mortgages of freeholds before 1926 see PARA 187.

3 As to a legal charge see PARA 191.

4 *Millett v Davey* (1862) 9 Jur NS 92; and see *Re Yates, Batcheldor v Yates* (1888) 38 ChD 112 at 117, CA. As to accounts see PARA 705 et seq. As to the rights of a mortgagee in possession of mines see PARA 206.

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437. Power to cut and sell timber.

A mortgagee in possession has statutory power to cut and sell timber and other trees ripe for cutting and not planted or left standing for shelter or ornament, and he may contract for any such cutting and sale, to be completed within any time not exceeding 12 months from the making of the contract¹. The power may, however, be varied or excluded by the mortgage deed², and in certain cases a felling licence may be necessary³. The proceeds of any such cutting or sale are applied as rents and profits.

1 Law of Property Act 1925 s 101(1)(iv). Under the former system of mortgages and apart from the statutory power, the mortgagee of the fee simple might cut timber by virtue of his ownership without committing waste at law, but in equity he would be restrained unless his security was defective: *Withrington v Banks* (1725) Cas temp King 30. In that case he might cut the timber and sell it (*Millett v Davey* (1862) 31 Beav 470 at 476), provided he applied the proceeds in payment of principal and interest (*Farrant v Lovel* (1750) 3 Atk 723). This applies, apart from the statutory power, to a term mortgage. As to the meaning of 'timber' see **FORESTRY** vol 52 (2009) PARA 54; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 187 et seq. As to trees planted or left standing for shelter or ornament see *Weld-Blundell v Wolseley* [1903] 2 Ch 664; and **SETTLEMENTS** vol 42 (Reissue) PARA 998.

2 See the Law of Property Act 1925 s 101(3), (4).

3 See **FORESTRY** vol 52 (2009) PARAS 120 et seq, 138. As to preservation of trees and tree preservation orders see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 847 et seq.

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438. Damage to cultivation.

A mortgagee in possession of agricultural land is liable for damage occasioned by his gross negligence in regard to cultivation¹ and should take proper means for preventing damage by strangers, but is not liable for waste committed under a claim of right which he has not authorised².

1 *Wragg v Denham* (1836) 2 Y & C Ex 117.

2 *Anon* (1823) 1 LJOS Ch 119.

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439. Remedies for wrongful waste.

Waste committed by the mortgagee which is not justified by the terms or the deficiency of his security, in addition to rendering him liable to an injunction, may be a ground for depriving him of possession, either by replacing the mortgagor in possession or by the appointment of a receiver¹. Conversely, a mortgagee may restrain by injunction a mortgagor in possession from committing waste which would render the security insufficient².

1 *Hanson v Derby* (1700) 2 Vern 392.

2 *King v Smith* (1843) 2 Hare 239; *Harper v Aplin* (1886) 54 LT 383. As to the mortgagor's liability for waste see PARAS 358-359.

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(4) SALE OUT OF COURT

(i) Express Power of Sale

440. Terms of express power.

So long as the equity of redemption remains vested in the mortgagor¹, the mortgagee may not sell the property except under an express or implied power of sale, or under a statutory power, or with the mortgagor's concurrence².

It was usual to insert in mortgages executed before 1 January 1882³ an express power of sale. The statutory power of sale⁴ renders express powers unnecessary, although it remains common to include an express power of sale in the mortgage in addition to the statutory power of sale⁵. A variation or extension of the statutory power operates as if it were a part of the statutory power⁶, and a conveyance on sale by a mortgagee is deemed to have been made in exercise of the statutory power of sale unless a contrary intention appears⁷.

1 As to the equity of redemption see PARA 302 et seq.

2 Where the mortgagor sells and obtains the mortgagee's concurrence, a deposit paid to their common agent who absconds is well paid as between the mortgagee and the purchaser (*Rowe v May* (1854) 18 Beav 613), but the mortgagee cannot be charged with it by the mortgagor or by a subsequent incumbrancer (*Barrow v White* (1862) 2 John & H 580). As to the appropriation of proceeds of sale received by the mortgagee see PARAS 471-474. As to the statutory restrictions on the enforcing of his security by a mortgagee in certain circumstances see PARAS 528-529.

3 I.e. the date of commencement of the Conveyancing Act 1881: see s 1(2) (repealed). It was not until the latter part of the nineteenth century that the insertion of a power of sale became a matter of course. In 1857 it was said not to be a universal practice: *Clarke v Royal Panopticon of Science and Art* (1857) 4 Drew 26 at 30. The insertion of the express power continued until 1882, notwithstanding the statutory power given by 23 & 24 Vict c 145 (1860) (known as Lord Cranworth's Act) (repealed).

4 See PARA 443.

5 There is nothing in the Law of Property Act s 101 (see PARA 443) or s 103 (see PARA 453) which restricts express powers conferred on the mortgagee in the mortgage deed itself: *The Maule* [1997] 1 WLR 528, [1997] 1 Lloyd's Rep 419, PC.

6 Law of Property Act 1925 s 101(3). This provision is designed to counter arguments that a purchaser under a sale pursuant to an express power is not afforded the statutory protection given by s 104 (see PARA 468). See *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch), [2009] 1 All ER (Comm) 745, [2009] 1 P & CR 153.

7 Law of Property Act 1925 s 104(3).

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441. Paramount effect of power of sale.

The power of sale is paramount to any subsequent arrangement between the mortgagee and mortgagor for the management of the premises. Thus where, by a deed subsequent to the mortgage, the mortgagee with power of sale and the mortgagor demised the mortgaged property to a receiver upon trust to grant leases, but the trusts were not declared to be subject to the power of sale, it was held that they were so in effect, and that the receiver must join in the conveyance to a purchaser from the mortgagee under the power of sale¹. The power is not extinguished by an ineffectual attempt to exercise it²; and even though the mortgagee believes himself to be absolute owner, and sells as such, the sale can be supported as a sale under the power³. When duly exercised, the power extinguishes the mortgagor's equity of redemption, and he is from then onwards only interested in the surplus proceeds of sale⁴.

1 *King v Heenan* (1853) 3 De GM & G 890.

2 *Henderson v Astwood* [1894] AC 150, PC.

3 *Henderson v Astwood* [1894] AC 150, PC; *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579 at 596, CA.

4 See PARAS 107, 471. See also *Duke v Robson* [1973] 1 All ER 481, [1973] 1 WLR 267, CA, where mortgagors contracted to sell only their equity of redemption so the plaintiff purchasers were in no better position than their vendor mortgagors to restrain a sale by the mortgagee.

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(ii) Implied Power of Sale

442. Mortgages of chattels and choses in action.

A mortgagee of personal chattels, when possession has been delivered to him¹, and a mortgagee of stocks and shares, including a mortgagee by deposit of the share certificates with a blank transfer², has, in the absence of an express power of sale, an implied power to sell the mortgaged property, where a day for payment is fixed by the mortgage, at any time after default, and, where no day for payment is fixed, after reasonable notice has been given to the mortgagor and default made in payment in pursuance of that notice³. The notice must be in all respects reasonable having regard to the circumstances of the case⁴. It is desirable that, in addition to fixing a day for payment, the notice should intimate that if the mortgagor fails to avail himself of the opportunity given to redeem, the mortgagee will be in a position to enforce his rights⁵ but it is not necessary that it should state that the mortgagee will sell⁶. In the case of shares, a month's or perhaps a fortnight's notice is reasonable⁷. The mortgagee does not prejudice his implied power of sale by claiming more than is due to him⁸, but he refuses at his own risk a tender of the amount actually due, although the mortgagee will not be restrained from selling unless the mortgagor pays into court the amount claimed to be due⁹.

1 See *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 233, CA; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1742. As to the distinction between mortgages and pledges see PARA 112.

2 *Stubbs v Slater* [1910] 1 Ch 632, CA (where it is pointed out that the headnote to *Pigot v Cubley* (1864) 15 CBNS 701, in so far as it states that a notice that the pledgee will sell unless an excessive sum is paid immediately is not such a notice as will justify the sale of a pledge, is not borne out by the judgment). As to mortgages of stocks and shares see PARA 237.

3 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 at 233, CA; *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA; *Wilson v Tooker* (1714) 5 Bro Parl Cas 193, HL; *Lockwood v Ewer* (1742) 2 Atk 303; *Kemp v Westbrook* (1749) 1 Ves Sen 278; *France v Clark* (1883) 22 ChD 830 (affd (1884) 26 ChD 257, CA). See also *McHugh v Union Bank of Canada* [1913] AC 299, PC; *The Odessa* [1916] 1 AC 145 at 159, PC.

4 *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579 at 593, CA.

5 *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579 at 593-594, CA.

6 *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579 at 596, CA.

7 *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579 at 595, 597, CA.

8 *Stubbs v Slater* [1910] 1 Ch 632, CA.

9 *Stubbs v Slater* [1910] 1 Ch 632 at 640, CA. As to payments into court see **CIVIL PROCEDURE** vol 11 (2009) PARA 729 et seq.

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(iii) Statutory Power of Sale

443. Application of the statutory power.

A power of sale is conferred by statute¹. The mortgage must be made by deed, but, subject to this, the power applies to any mortgage, charge or lien on real or personal property or any interest in it, or any thing in action², except certain bills of sale³, and possibly debentures upon a statutory public utility company⁴.

The registered proprietor or person entitled to be registered as proprietor of a registered charge over registered land is entitled to exercise owners' powers⁵, which include power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage⁶.

An equitable mortgagee under a memorandum of charge by deed containing an appropriate power of attorney⁷ can convey the legal estate on sale by him in exercise of the statutory power of sale⁸. The power of sale does not affect the right of foreclosure⁹, may be varied or extended by the mortgage deed, applies to the mortgage only so far as a contrary intention is not expressed in it, and has effect subject to the terms of the mortgage deed and to the provisions contained in it¹⁰.

1 See the Law of Property Act 1925 s 101(1)(i), (5). The power in s 101(1)(i) is subject to the Commonhold and Leasehold Reform Act 2002 s 21 (no disposition of part-units: see **COMMONHOLD** vol 13 (2009) PARA 350): Law of Property Act 1925 s 101(1A) (added by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 2). As to mortgages of commonhold land see PARA 203.

2 See the Law of Property Act 1925 s 205(1)(xvi), (xx).

3 The bills of sale subject to the Bills of Sale Act 1878 (Amendment) Act 1882: see *Calvert v Thomas* (1887) 19 QBD 204, CA. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1742.

4 In *Blaker v Herts and Essex Waterworks Co* (1889) 41 ChD 399 at 406, debentures of all companies were thought to be excluded; but *Deyes v Wood* [1911] 1 KB 806 at 818, CA, suggests that the exclusion is limited as stated in the text. As to enforcing a security under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 220 et seq.

5 See the Land Registration Act 2002 s 24; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 908.

6 See the Land Registration Act 2002 s 23(2).

7 See PARA 133.

8 See *Re White Rose Cottage* [1965] Ch 940, [1965] 1 All ER 11, CA.

9 Law of Property Act 1925 s 106(2). As to foreclosure see PARA 566 et seq.

10 See the Law of Property Act 1925 s 101(3), (4).

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444. Mode of sale.

The statutory power of sale¹ authorises the mortgagee², when the mortgage³ money has become due⁴, to sell, or to concur with any other person in selling, the mortgaged property⁵ or any part of it either subject to prior charges or not, and either together or in lots, by public auction or private contract⁶, subject to such conditions of title as he thinks fit⁷. The mortgagee exercising the power of sale has also power to vary any contract of sale, and to buy in at an auction, and to rescind any contract of sale, and to re-sell, without being answerable for any loss occasioned by it⁸. A mortgagee exercising the power of sale also has power by deed to convey the property sold for such estate or interest as he is by the Law of Property Act 1925 authorised to sell or convey or as may be the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage⁹.

1 As to the statutory power of sale see PARA 443. As to the restrictions on the exercise of the power see PARA 453.

2 As to the meaning of 'mortgagee' see PARA 104 note 1.

3 As to the meaning of 'mortgage' see PARA 101 note 4.

4 I.e. when the legal date for redemption, if any, has passed or in the case of an instalment mortgage as soon as each instalment becomes due: see *Payne v Cardiff RDC* [1932] 1 KB 241. The power may be excluded before a specified date: see *Twentieth Century Banking Corp Ltd v Wilkinson* [1977] Ch 99, [1976] 3 All ER 361, where the express provision that the mortgage money was to become due on a specified date excluded the statutory power to sell at any previous time.

5 The mortgaged property is the property over which the mortgage deed purports to extend: *Re White Rose Cottage* [1964] Ch 483, [1964] 1 All ER 169; on appeal [1965] Ch 940, [1965] 1 All ER 11, CA.

6 A retaking by a local authority under a right of pre-emption in its mortgage is not a sale either by public auction or private contract, as a mortgagee cannot sell to himself: *Williams v Wellingborough Borough Council* [1975] 3 All ER 462, [1975] 1 WLR 1327, CA.

7 See the Law of Property Act 1925 s 101(1)(i). See *Property and Bloodstock Ltd v Emerton* [1968] Ch 94, [1967] 3 All ER 321, CA. The statutory power of sale includes such power of selling the fee simple or any leasehold reversion as is conferred by the provisions of the Law of Property Act 1925 relating to realisation of mortgages: s 101(6). As to the realisation of mortgages see ss 88-89; and PARAS 446-449. Exercise of statutory power of sale under s 101, after default by the mortgagor, is not a deprivation of possessions within meaning of European Convention on Human Rights First Protocol art 1: *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch), [2009] 1 All ER (Comm) 745, [2009] 1 P & CR 153. As to the right to property protected under the European Convention on Human Rights First Protocol art 1 see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 165.

8 See the Law of Property Act 1925 s 101(1)(i).

9 Law of Property Act 1925 s 104(1). Nothing in the Consumer Credit Act 1974 affects the operation of this provision: s 177(2).

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445. Effect of disposition by mortgagee of registered land.

If a registrable disposition¹ of a registered estate² is made for valuable consideration by a mortgagee entitled to do so³, completion of the disposition by registration has the effect of

postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration⁴.

- 1 As to the meaning of 'registrable disposition' see PARA 159 note 8.
- 2 As to the meaning of 'registered estate' see PARA 159 note 7.
- 3 As to the power to make a registered disposition see PARA 443.
- 4 See the Land Registration Act 2002 s 29(1); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 935.

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446. Effect of conveyance by mortgagee by demise.

On a sale by a mortgagee¹ by demise of an estate in fee simple, the conveyance by the mortgagee operates to vest the fee simple in the purchaser², and the mortgage term or the charge by way of legal mortgage³ and any subsequent mortgage terms or charges merge or are extinguished as respects the land conveyed⁴. The conveyance, under a mortgage of freeholds, has the same statutory operation whether it is made under an express power of sale or under the statutory power⁵.

Thus it is sufficient for the mortgagee to be named alone as the conveying party⁶, although as regards the fee simple the conveyance may be made in the name of the estate owner in whom the fee simple is vested⁷. Usually the mortgagee is named alone.

The vesting of the fee simple in the purchaser is subject to any legal mortgage (including a legal charge) which has priority to the mortgage in right of which the sale is made and to any money secured by it⁸. Thus the purchaser takes the fee simple clear of the mortgage term⁹.

On a sale by the mortgagee by sub-demise under his statutory power of sale or on express power of sale in a leasehold mortgage, the conveyance by him operates to convey to the purchaser, not only the mortgage term, but also (unless expressly excepted by the permission of the court¹⁰) the leasehold reversion¹¹; and the mortgage term and any subsequent mortgage term or charge merge in the leasehold reversion or are extinguished (unless excepted by leave of the court)¹². The vesting of the leasehold reversion is subject to any legal mortgage (including a legal charge) which has priority to the mortgage in right of which the sale is made and to any money secured by it¹³. The conveyance of the leasehold reversion may be made in the name of the estate owner in whom it is vested¹⁴; and where a licence to assign is required on a sale by a mortgagee, the licence is not to be unreasonably refused¹⁵.

1 As to the meaning of 'mortgagee' see PARA 104 note 1. The power of sale is effectively exercised as soon as there is an enforceable contract for sale of the mortgaged property: *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310; *Property and Bloodstock Ltd v Emerton* [1968] Ch 94, [1967] 3 All ER 321, CA; *National and Provincial Building Society v Ahmed* [1995] NPC 88, [1995] 2 EGLR 127, CA; *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964.

2 See the Law of Property Act 1925 s 88(1)(a).

3 As to the meaning of 'legal mortgage' see PARA 104 note 1.

4 See the Law of Property Act 1925 s 88(1)(b).

- 5 See the Law of Property Act 1925 s 88(1). As to the statutory power of sale see PARA 443. As to express powers of sale see PARA 440 et seq.
- 6 See the Law of Property Act 1925 s 9.
- 7 See the Law of Property Act 1925 s 88(1).
- 8 See the Law of Property Act 1925 s 88(1)(a).
- 9 The effect is the same as when under the former system the mortgagee conveyed the fee simple free from any equity of redemption. This included the equity of redemption of the mortgagor and of his subsequent incumbrancers.
- 10 The Law of Property Act 1925 gives no direction as to the grounds on which the nominal reversion will be excepted. The object of excepting it would be to save the purchaser from becoming liable on the lessee's covenants. These might be so onerous as to be unfair to the purchaser or prevent a beneficial realisation by the mortgagee.
- 11 See the Law of Property Act 1925 s 89(1)(a).
- 12 See the Law of Property Act 1925 s 89(1)(b).
- 13 See the Law of Property Act 1925 s 89(1)(a).
- 14 See the Law of Property Act 1925 s 89(1).
- 15 See the Law of Property Act 1925 s 89(1). As to the general provision to this effect made by the Landlord and Tenant Act 1927 s 19(1) see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 486 et seq.

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447. Effect of conveyance by mortgagee by legal charge.

Where the mortgage¹ is created by charge by deed expressed to be by way of legal mortgage, the mortgagee² has the same statutory power of sale as if the mortgage were by demise³. There is in this case, however, no term which requires to be merged in the freehold or leasehold reversion, and it is provided that the conveyance by the mortgagee is to operate, as in the case of a mortgage by demise, to vest in the purchaser the fee simple or the lease, and the legal charge is extinguished⁴.

Where the mortgage, whether freehold or leasehold, includes fixtures or chattels personal, the statutory power of sale extends to the absolute or other interest in them affected by the charge⁵, but trade machinery may not be sold by the mortgagee separately from the land⁶.

- 1 As to the meaning of 'legal mortgage' see PARA 104 note 1. As to the meaning of 'mortgage' see PARA 101 note 4.
- 2 As to the meaning of 'mortgagee' see PARA 104 note 1.
- 3 See the Law of Property Act 1925 s 87(1); and PARA 191.
- 4 See the Law of Property Act 1925 ss 88(1), 89(1). As to provisions corresponding to those stated in the text which apply in the case of foreclosure see ss 88(2), 89(2); and PARA 607. As to provisions which apply in the case of the mortgagee acquiring title by the running of time see ss 88(3), 89(3); and **LIMITATION PERIODS** vol 68 (2008) PARA 1099.
- 5 See the Law of Property Act 1925 ss 88(4), 89(4).
- 6 See PARA 463.

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448. Extent of the interest conveyed.

The statutory provisions relating to the effect of conveyances by mortgagees¹ apply whether the mortgage² was created before or after the commencement of the Law of Property Act 1925, and to mortgage terms created by that Act³. In the case of a mortgage of freeholds, the provisions do not operate to confer a better title to the fee simple than would have been acquired if the statutory restrictions on the effect and creation of mortgages⁴ had not been in force and the fee simple had been validly conveyed by the mortgage and all prior mortgages, if any, not being merely equitable charges had been created by demise or legal charge⁵. In the case of mortgages of leaseholds, the provisions take effect without prejudice to any incumbrance⁶ or trust affecting the leasehold reversion which has priority over the mortgage in right of which the sale, foreclosure, or title is made or acquired, and do not apply where the mortgage term does not comprise the whole of the land⁷ included in the leasehold reversion, unless the rent, if any, payable in respect of that reversion has been apportioned as respects the land affected, or the rent is of no money value, or no rent is reserved, and unless the lessee's⁸ covenants and conditions, if any, have been apportioned, either expressly or by implication, as respects the land affected⁹. For this purpose, an equitable apportionment made without the lessor's¹⁰ consent is sufficient¹¹.

¹ In the Law of Property Act 1925 ss 88(1), 89(1): see PARAS 446-447. As to the meaning of 'mortgagee' see PARA 104 note 1.

² As to the meaning of 'mortgage' see PARA 101 note 4.

³ See the Law of Property Act 1925 ss 88(6), 89(6) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule).

⁴ See PARAS 190-192.

⁵ See the Law of Property Act 1925 s 88(6).

⁶ As to the meaning of 'incumbrance' see PARA 223 note 4.

⁷ As to the meaning of 'land' see PARA 104 note 2.

⁸ As to the meaning of 'lessee' see PARA 349 note 5.

⁹ See the Law of Property Act 1925 s 89(6) (as amended: see note 3).

¹⁰ As to the meaning of 'lessor' see PARA 350 note 3.

¹¹ See the Law of Property Act 1925 s 89(6) (as amended: see note 3). A legal apportionment of rent can now be made: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 278 et seq.

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449. Effect of conveyance by sub-mortgagee.

The provisions as to the realisation of freehold and leasehold mortgages by sale¹ are adapted to freehold and leasehold sub-mortgages as follows. In the case of a sub-mortgage by sub-demise of a long term (less a nominal period) itself limited out of an estate in fee simple, the provisions operate as if the derivative term, if any, created by the sub-term had been limited out of the fee simple, and so as to enlarge the principal term and extinguish the derivative term created by the sub-mortgage and to enable the sub-mortgagee to convey the fee simple². In the case of a sub-mortgage by sub-demise of a term (less a nominal period) itself limited out of a leasehold reversion, the provisions operate as if the derivative term created by the sub-mortgage had been limited out of the leasehold reversion, and so as to merge the principal mortgage term in it as well as the derivative term created by the sub-mortgage and to enable the sub-mortgagee to convey the leasehold reversion³.

1 Ie the Law of Property Act 1925 ss 88, 89: see PARAS 446-448.

2 See the Law of Property Act 1925 s 88(5).

3 See the Law of Property Act 1925 s 89(5).

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450. Power of mortgagee of ship or aircraft.

A registered mortgagee of a ship or a share in a ship has power absolutely to dispose of the ship or share and to give effectual receipts for the purchase money¹, but, where two or more mortgagees are registered in respect of the same ship or share, a subsequent mortgagee, except under the order of a court of competent jurisdiction, may not exercise this power without the concurrence of every prior mortgagee².

The mortgagee of an aircraft or hovercraft has the statutory power of sale where the mortgage is by deed³.

1 See the Merchant Shipping Act 1995 s 16(1), Sch 1 para 9(1); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 333. As to mortgages of ships generally see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 318 et seq. As to duties owed by a mortgagee in exercising the power of sale see *Den Norske Bank ASA v Acemex Management Co Ltd (The Tropical Reefer)* [2003] EWCA Civ 1559, [2004] 1 All ER (Comm) 904, [2005] 1 BCLC 274.

2 See the Merchant Shipping Act 1995 Sch 1 para 9(2); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 333.

3 See PARA 443.

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(iv) Who may Exercise the Power

451. Devolution of statutory powers.

The statutory power of sale under the Law of Property Act 1925¹ is exercisable by any person for the time being entitled to receive and give a discharge for the mortgage money²; that is, by persons who are either mortgagees or have the mortgaged property vested in them, such as executors. Persons deriving title under the original mortgagee can also exercise the power³. The mortgagee's agent under a power of attorney may not sell by virtue of an authority to receive the money, although he may sell if the power of attorney expressly authorises him to exercise the power of sale⁴.

In relation to registered land, the power may be exercised by the registered proprietor of a registered charge or by the person entitled to be registered as proprietor⁵.

1 As to the statutory power of sale see PARA 443.

2 Law of Property Act 1925 s 106(1). As to the meaning of 'mortgage money' see PARA 104 note 1.

3 See the Law of Property Act 1925 s 205(1)(xvi) (definition of 'mortgagee'); and PARA 104 note 1. See also PARA 364 et seq.

4 *Re Dowson and Jenkins's Contract* [1904] 2 Ch 219, CA.

5 See the Land Registration 2002 s 24; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 908.

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452. Express power.

An express power of sale¹ is exercisable only by the persons who are designated for that purpose by the power².

A power of sale in a mortgage to two mortgagees who are expressed to advance the money on a joint account³ is exercisable by the survivor⁴, but a power of sale in a mortgage to partners is not exercisable by one unless it is so expressed in the mortgage⁵.

1 As to express powers of sale see PARA 440 et seq.

2 *Re Crunden and Meux's Contract* [1909] 1 Ch 690 at 695; and see also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 369; **SALE OF LAND** vol 42 (Reissue) PARA 226. As to devolution of powers and trusts see the Trustee Act 1925 s 18; and **TRUSTS** vol 48 (2007 Reissue) PARA 817.

3 See PARA 212.

4 *Hind v Poole* (1855) 1 K & J 383.

5 *Warr v Jones* (1876) 24 WR 695. As to the power of partners to lend on mortgage see PARA 165.

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(v) Conditions of Exercise of the Power

453. Restrictions on exercise of statutory powers.

The time when the power of sale arises is fixed in the manner already stated¹, but restrictions are placed on the time when it is exercisable. The statutory power of sale is not exercisable until:

- 43 (1) notice² requiring payment of the mortgage money³ has been served on the mortgagor⁴ or one of two or more mortgagors, and default has been made in payment of it, or of part of it, for three months⁵ after such service⁶;
- 44 (2) some interest under the mortgage is in arrear⁷ and unpaid for two months after becoming due⁸; or
- 45 (3) there has been a breach of some provision in the mortgage deed or in the Law of Property Act 1925 on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than the covenant for payment of principal or interest⁹.

The restrictions may, however, be negated or varied¹⁰. In a bank mortgage to secure all moneys due, the restrictions are generally excluded and the power of sale is exercisable following demand or default. Where a charge provides a specific date for the mortgage money to become due, the statutory power of sale may not be exercised before that date even if the mortgagor is in default¹¹. It has been held that where in a bank mortgage the power was to be exercisable on default in payment of the balance due on current account for one month after the closing of the account, and the account was closed by notice of insolvency, the month ran from the receipt of the notice¹².

An express power of sale is usually subject to restrictions similar to the restrictions mentioned above¹³. The exercise of the power of sale is not contrary to the right to protection of property under the European Convention on Human Rights¹⁴.

1 As to express powers of sale see PARA 440; as to implied powers of sale see PARA 442; and as to the statutory power of sale see PARAS 443-450.

2 As to such notice see PARAS 454-455.

3 As to the meaning of 'mortgage money' see PARA 104 note 1. As to the meaning of 'mortgage' see PARA 101 note 4.

4 As to the meaning of 'mortgagor' see PARA 104 note 1.

5 'Month' means calendar month: see the Interpretation Act 1978 ss 5, 22(1), Sch 1, Sch 2 para 4(1).

6 Law of Property Act 1925 s 103(i).

7 The capitalisation of arrears may make this inapplicable: see *Davy v Turner* (1970) 21 P & CR 967, 114 Sol Jo 884.

8 Law of Property Act 1925 s 103(ii). It is sufficient if an instalment which includes interest is in arrear for two months: *Walsh v Derrick* (1903) 19 TLR 209, CA. See also *Payne v Cardiff RDC* [1932] 1 KB 241.

9 See the Law of Property Act 1925 s 103(iii). The breach may have been waived: see eg *Braithwaite v Winwood* [1960] 3 All ER 642, [1960] 1 WLR 1257.

10 See PARA 443. The power of sale under the Law of Property Act 1925 (see PARA 443) can be made immediate by providing in the mortgage that the mortgagee is to have the statutory power but without the restrictions imposed by s 103. In the case of a bankrupt mortgagor, the permission of the court may be necessary under s 110(1): see PARA 524.

11 *Twentieth Century Banking Corp Ltd v Wilkinson* [1977] Ch 99, [1976] 3 All ER 361.

12 *Berry v Halifax Commercial Banking Co Ltd* [1901] 1 Ch 188.

13 As to express powers of sale see PARA 440.

14 *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch), [2009] 1 All ER (Comm) 745. As to the right to the protection of property see the European Convention on Human Rights First Protocol art 1; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 165.

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454. Notice requiring payment.

A notice to the mortgagor requiring payment of the mortgage money¹ for the purpose of complying with the statutory restrictions on the exercise of power of sale or a notice required by the mortgage to be served² must be in writing³.

Such a notice is sufficient although only addressed to the mortgagor⁴ by that designation without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected is absent, under disability, unborn or unascertained⁵.

The notice is sufficiently served⁶ if left at the mortgagor's last-known place of abode or business in the United Kingdom⁷, or if it is affixed or left for him on the land⁸ or any house or building comprised in the mortgage⁹, or if it is sent in a registered letter, or by recorded delivery service, addressed to the mortgagor at his place of abode or business, and is not returned undelivered by the postal operator concerned¹⁰. Service by registered letter is deemed to be made at the time when the letter would in the ordinary course be delivered¹¹.

Where there are several mortgagors it is sufficient if the notice is served on one of them¹². Where the mortgagor is dead it should be served on the person entitled to redeem¹³. Where an express power provided for notice to the mortgagor, his heirs, executors or administrators, or any of them, notice to the executors alone has been held to be sufficient¹⁴. Where there are subsequent incumbrancers, it may be that it is sufficient to serve only the mortgagor, but the first subsequent incumbrancer should also be served¹⁵. When an express power of sale provides for notice to the mortgagor, or his assigns, notice to a second mortgagee is necessary, although it is doubtful whether it must also be given to the mortgagor¹⁶. To ascertain the subsequent incumbrancers, search should be made in the land charges register for puisne mortgages¹⁷. Where an express power is stated to be exercisable immediately with a proviso that it is not to be exercised until default under the covenant for payment, a second mortgagee is not entitled to notice, as he is not liable under the covenant¹⁸.

1 I.e a notice under the Law of Property Act 1925 s 103(i): see PARA 453.

2 *Wandsworth London Borough Council v Atwell* [1996] 1 EGLR 57, [1995] NPC 67, CA.

3 See the Law of Property Act 1925 s 196(1). 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly: Interpretation Act 1978 s 5, Sch 1.

4 As to the meaning of 'mortgagor' see PARA 104 note 1.

5 See the Law of Property Act 1925 s 196(2). It has been held sufficient to put a notice through the letterbox of the premises even though the premises were vacant and the tenant in prison and the landlord knew that the tenant could be contacted through his solicitor: *Van Haarlam v Kasner* (1992) 64 P & CR 214, [1992] 2 EGLR 59.

6 Service is presumed if the requirements of the Law of Property Act 1925 s 196 are complied with, even though the notice is never received: see *R v Westminster Unions Assessment Committee, ex p Woodward & Sons* [1917] 1 KB 832, DC. Where one is considering a notice in writing there can be no difference between 'serving' the notice and 'giving' the notice: *Re 88, Berkeley Road, NW 9, Rickwood v Turnsek* [1971] Ch 648, [1971] 1 All ER 254.

7 Under a similar provision in an express power it is sufficient to fix the notice on the door of the mortgagor's last known place of abode: *Major v Ward* (1847) 5 Hare 598. A notice left at the furthest place to which a member of the public or a postman could go, constituted service at the place of abode: *Henry Smith's Charity Trustees v Kyriakou* [1989] RVR 106, [1989] 2 EGLR 110, CA. 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Isle of Man nor the Channel Islands are within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 3. 'England' means, subject to any alteration of boundaries of local government areas, the area consisting of the counties established by the Local Government Act 1972 s 1 (see **LOCAL GOVERNMENT** vol 69 (2009) PARAS 5, 22), Greater London and the Isles of Scilly: Interpretation Act 1978 s 5, Sch 1. As to the meaning of 'Wales' see PARA 372 note 1.

8 As to the meaning of 'land' see PARA 104 note 2.

9 See the Law of Property Act 1925 s 196(3).

10 See the Law of Property Act 1925 s 196(4) (amended by SI 2001/1149); Recorded Delivery Service Act 1962 s 1. See also *Stephenson & Son v Orca Properties Ltd* [1989] 2 EGLR 129, [1989] 44 EG 81; and note 6.

11 Law of Property Act 1925 s 196(4) (as amended: see note 10).

12 See the Law of Property Act 1925 s 103(i); and PARA 453.

13 See the Law of Property Act 1925 s 205(1)(xvi) (definition of 'mortgagor'); and PARA 104 note 1. Service will be on the personal representatives until by assent or conveyance they have vested the property in some person entitled: see the Administration of Estates Act 1925 s 36(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 563. Where no grant of representation has been filed, the notice should be addressed to 'The Personal Representatives of' the deceased and left at or sent by to his last known place of residence or business in the United Kingdom and a copy of it, similarly addressed, should be served on the Public Trustee: see the Law of Property (Miscellaneous Provisions) Act 1994 s 18(1). Note that the offices of the Public Trustee and the Official Solicitor have been reorganised, and the trust division of the Public Trust Office has merged with the office of the Official Solicitor: see **TRUSTS** vol 48 (2007 Reissue) PARA 766 et seq. Service of a notice which would be effective but for the death of the intended recipient is effective despite his death if the mortgagee had no reason to believe that he had died: see s 17(1).

14 *Gill v Newton* (1866) 14 WR 490.

15 'Mortgagor' includes any person deriving title under the original mortgagor: see the Law of Property Act 1925 s 205(1)(xvi); and PARA 104 note 1. Thus the persons to whom notice may be given appear to be the mortgagor and all the incumbrancers; and if these are treated as 'several mortgagors', notice to the first incumbrancer who has given notice of his security to the mortgagee who sells is sufficient. On the other hand, as long as the mortgagor retains an equity of redemption, it may be that he remains sole mortgagor for the purposes of s 103 (see the text to note 12), so that notice to him is necessary and sufficient.

16 *Hoole v Smith* (1881) 17 ChD 434. However, it seems proper to give the notice to the mortgagor and the first of the subsequent incumbrancers.

17 See the Land Charges Act 1972 s 2(1), (4)(i); PARA 260; and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628-629.

18 *Tozer v Buxton* (1888) 5 TLR 7.

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455. Form of notice.

A notice requiring payment of the mortgage money¹ may be in the form of a demand for immediate payment, with an intimation that if the money is not paid before the expiration of three months from the date of service the mortgagee will proceed to sell; but it is equally effectual if it is in the form of a notice to pay at the expiration of that period, as the three months' default begins to run forthwith². Under an express power of sale the notice is good if in effect it gives the mortgagor the prescribed period of warning³. A notice is not rendered ineffective if it overstates the principal⁴.

1 As to such notices see PARA 454.

2 *Barker v Illingworth* [1908] 2 Ch 20, distinguishing *Selwyn v Garfit* (1888) 38 ChD 273, CA, where it was held that a notice was bad because it was given before the legal date for payment of the mortgage money had arrived.

3 *Metters v Brown* (1863) 33 LJCh 97.

4 *Clyde Properties Ltd v Tasker* [1970] NZLR 754.

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456. When power of sale may be exercised.

The mortgagee may not exercise the power of sale until the notice, where notice is required, has expired, or until such other event as makes it immediately exercisable; but he may enter into a conditional contract to sell on the power becoming exercisable, and may carry that contract into effect provided that the price is then proper¹. The acceptance of a bill of exchange for the amount due only suspends the notice, and on the dishonour of the bill the notice revives and the mortgagee may sell without a fresh notice².

1 *Major v Ward* (1847) 5 Hare 598 at 604; *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 412, CA.

2 *Wood v Murton* (1877) 47 LJQB 191.

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457. When mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute¹, or because the mortgagor has begun a redemption claim², or because the mortgagor objects to the manner in which the sale is being arranged³. He will be restrained, however, if the mortgagor pays the amount claimed into court⁴, that is, normally, the amount which the mortgagee claims to be due to him⁵, unless, on the terms of the mortgage, the claim is excessive⁶; but where he was the mortgagor's solicitor at the time of the mortgage, the court will fix a sum probably sufficient to cover his claim⁷. The mortgagee will also be restrained if, upon a subsequent incumbrancer offering to pay off the first mortgage, the mortgagee denies

his title to redeem⁸, and possibly where the validity of the mortgage or the availability of the power of sale is in issue⁹. The extent to which a mortgagee of a ship is bound to a charterparty entered into by the mortgagor is considered elsewhere in this work¹⁰. The sale is improper if at the time of sale the mortgagor tenders the amount due for principal and interest, even though without costs¹¹.

Where a mortgage deed conferring an express power of sale contains a covenant that the power is not to be exercised without a specified notice, but that the only remedy for breach of the covenant is to be in damages against the mortgagee, it has been held that the court cannot restrain the sale on the ground of want of notice¹²; but it seems that, ordinarily, want of due notice in accordance with the terms of an express power of sale, as it is a ground for setting aside a sale against a purchaser with knowledge, is a ground for restraining a sale¹³. If the mortgagee has, in exercise of his statutory power of sale, entered into a contract for the sale of the property, the court will not, upon tender of the money due under the mortgage, interfere to stop the completion of the sale by conveyance unless the contract was entered into in bad faith¹⁴. The fact that the contract is at an undervalue is not by itself proof of bad faith¹⁵.

1 *Cockell v Bacon* (1852) 16 Beav 158; *Gill v Newton* (1866) 14 WR 490. As to restraining the sale where it involves a breach of trust see *Merest v Murray* (1866) 14 LT 321. As to a sale after a winding up petition by the mortgagee see *Re Cambrian Mining Co Ltd, ex p Fell* (1881) 50 LJCh 836.

2 *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301, 2 BCC 99, 102. See also *Adams v Scott* (1859) 7 WR 213. As to proceedings for redemption see PARA 656 et seq.

3 *Anon* (1821) 6 Madd 10.

4 *Jones v Matthie* (1847) 11 Jur 504; *Whitworth v Rhodes* (1850) 20 LJCh 105; *Warner v Jacob* (1882) 20 ChD 220 at 224; *Cavenagh v Cohen* (1919) 147 LT Jo 252; *Duke v Robson* [1973] 1 All ER 481, [1973] 1 WLR 267, CA. As to payments into court see **CIVIL PROCEDURE** vol 11 (2009) PARA 729 et seq.

5 *Hill v Kirkwood* (1880) 28 WR 358, CA. This is a rule of practice, which may no longer be applied as inflexibly as before: see *Rottenburg v Monjack* [1992] BCC 688, [1992] NPC 89; *Eltran Pty Ltd v Westpac Banking Corp* (1988) 32 FCR 195.

6 *Hickson v Darlow* (1883) 23 ChD 690, CA.

7 *Macleod v Jones* (1883) 24 ChD 289, CA.

8 *Rhodes v Buckland* (1852) 16 Beav 212.

9 *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA. See also *Allfox Building Pty Ltd v Bank of Melbourne* (1992) NSW Conv R 55-634, 66 ALJ 863.

10 See **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 331.

11 *Jenkins v Jones* (1860) 2 Giff 99.

12 *Prichard v Wilson* (1864) 10 Jur NS 330.

13 *Selwyn v Garfit* (1888) 38 ChD 273, CA; and see PARA 455. See also **CIVIL PROCEDURE** vol 11 (2009) PARAS 472-474.

14 *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310; *Property and Bloodstock Ltd v Emerton* [1968] Ch 94, [1967] 3 All ER 321, CA; *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964.

15 *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310.

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(vi) Mode of Exercise of the Power

458. Duty of mortgagee on exercise of power of sale.

A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale¹. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor². He is not obliged to delay in the hope of obtaining a higher price³, or if redemption is imminent⁴ or until after the pursuit of an application for planning permission or the grant of a lease of the mortgaged property, though the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and price obtained on sale. A mortgagee is entitled to sell the property in the condition in which it stands without investing money or time in increasing its likely sale value. He is entitled to discontinue efforts already undertaken to increase the likely sale value in favour of such a sale⁵. He can decide if and when to sell on the basis of his own interests⁶.

A mortgagee owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment⁷ and to take reasonable precautions to secure a proper price⁸. The duty is not breached where the mortgagee has mixed motives for a sale, one of which is to secure repayment⁹. Nor is the duty breached by a mortgagee's assessment of the market value of the mortgaged property which falls within an acceptable margin of error¹⁰. The duty is owed to the mortgagor, subsequent mortgagees¹¹, and a surety¹² but not to others such as beneficiaries under a trust of the mortgaged property¹³. The duty cannot be replaced or supplemented by a liability in negligence¹⁴. It can, however, be excluded by agreement¹⁵.

The limitation period for a claim against the mortgagee for breach of its duty in equity is six years¹⁶.

If the mortgagor seeks relief promptly¹⁷, a sale will be set aside if there is some element of impropriety or bad faith on the part of the mortgagee in the exercise of its power of sale¹⁸, but not on the ground of undervalue alone¹⁹, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale²⁰ or if it would be inequitable as between the mortgagor and the purchaser for the sale to be set aside²¹. However, if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it²² or liable for damages. The prima facie measure of damage is the reduction in the value of the equity of redemption²³.

1 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997. As to express powers of sale see PARA 440 et seq. As to the statutory power of sale see PARA 443.

2 *Lloyd's Bank plc v Bryant* [1996] NPC 31; *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA; *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC. If the mortgagor wishes the property to be sold he should apply for an order for sale under the Law of Property Act 1925 s 91: see PARAS 616 et seq, 671. See also PARA 572.

3 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

4 *Routestone Ltd v Minories Finance Ltd* [1997] 1 EGLR 123, [1996] NPC 83.

5 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

- 6 *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.
- 7 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997. See also *Mortgage Express v Mardner* [2004] EWCA Civ 1859, [2004] All ER (D) 299 (Dec); *Bradford and Bingley plc v Ross* [2005] EWCA Civ 394, (2005) Times, 2 May, [2005] All ER (D) 210 (Mar).
- 8 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633; *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC. See also *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC.
- 9 *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch), [2007] Ch 197, [2006] 3 All ER 1029 (partly revs'd on other grounds [2007] EWCA Civ 1303, [2008] Ch 244, [2007] All ER (D) 156 (Dec)).
- 10 *Michael v Miller* [2004] EWCA Civ 282, [2004] 2 EGLR 151.
- 11 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC.
- 12 *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA; *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC.
- 13 *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12, [1990] 2 All ER 577, CA. A beneficiary can sue on behalf of the trust if the trustee unreasonably refuses to do so or has committed some breach of his duties to the beneficiaries: *Parker-Tweedale v Dunbar Bank plc* above.
- 14 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC.
- 15 *Bishop v Bonham* [1988] 1 WLR 742, [1988] BCLC 656, CA.
- 16 See *Raja v Lloyds TSB Bank plc* [2001] EWCA Civ 210, 82 P & CR 191, [2001] Lloyd's Rep Bank 113; and **LIMITATION PERIODS** vol 68 (2008) PARAS 953-954.
- 17 *Nutt v Easton* [1900] 1 Ch 29, CA. As to such relief see **CIVIL PROCEDURE** vol 11 (2009) PARAS 373-374.
- 18 *Corbett v Halifax Building Society* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964; *Warner v Jacob* (1882) 20 ChD 220 at 224; *Haddington Island Quarry Co Ltd v Huson* [1911] AC 727, PC; *Jones v Matthie* (1847) 11 Jur 504; *Davey v Durrant*, *Smith v Durrant* (1857) 1 De G & J 535 at 538; *Adams v Scott* (1859) 7 WR 213.
- 19 *Corbett v Halifax Building Society* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964; *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310.
- 20 *Newport Farm Ltd v Damesh Holdings Ltd* [2003] UKPC 54, [2003] 147 Sol Jo LB 1117; *Ferrand v Clay* (1837) 1 Jur 165.
- 21 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC.
- 22 *Wolff v Vanderzee* (1869) 17 WR 547; 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1890.
- 23 *Adamson v Halifax plc* [2002] EWCA Civ 1134, [2003] 4 All ER 423, [2003] 1 WLR 60, CA.

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459. Mode of sale.

The burden is on the mortgagor to show that the mortgagee has breached the duty to take reasonable precautions to secure a proper price, unless the sale is to a company in which the mortgagee is interested or a similarly connected purchaser¹. There is no general obligation

upon a mortgagee to sell the whole of the mortgaged property if he does not choose to, but he must not, in selling what he does sell, deliberately destroy its value by failing to sell what would normally and naturally form part of what he does sell². The mortgagee is not bound to postpone the sale in the hope of obtaining a better price nor to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss³. A mortgagee selling specialist property should take specialist advice as to its value, advertising and the mode of sale⁴. Although the mortgagee can choose the time of sale he should normally ensure that the property is exposed to the market for an adequate length of time⁵, in appropriate publications⁶, and should obtain an open market valuation⁷. It is not necessarily sufficient for the mortgagee to advertise the property and sell it at auction⁸.

It is an open question whether a mortgagee discharges his duty by instructing a competent agent⁹. An agent is not negligent in his handling of the sale merely because another agent would have acted differently¹⁰ and a mortgagee who has instructed an agent is unlikely to have breached his duty to the mortgagor merely because a different agent would have given different advice.

The mortgagee may sell on the terms that a substantial part, or even the whole, is to remain on mortgage¹¹.

1 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC. There is no such burden on the mortgagee simply because the selling agents are connected to the mortgagee: *Morgan v Lloyds Bank plc* [1998] Lloyd's Rep Bank 72, CA. The mortgagee cannot sell to himself: see PARA 466.

2 *Huish v Ellis* [1995] BCC 462, [1995] NPC 3; *Champagne Perrier-Jouet SA v HH Finch Ltd* [1982] 3 All ER 713, [1982] 1 WLR 1359.

3 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC; *Bell v Long* [2008] EWHC 1273 (Ch), [2008] 2 BCLC 706, [2008] BPIR 1211, [2008] All ER (D) 179 (Jun).

4 *American Express International Banking Corp v Hurley* [1985] 3 All ER 564, [1986] BCLC 52.

5 *Predeth v Castle Phillips Finance Co Ltd* [1986] 2 EGLR 144, 279 Estates Gazette 1355, CA, where a period of three months was held to be appropriate. See also *Routestone Ltd v Minorities Finance Ltd* [1997] 1 EGLR 123, [1996] NPC 83.

6 *American Express International Banking Corp v Hurley* [1985] 3 All ER 564, [1986] BCLC 52.

7 *Predeth v Castle Phillips Finance Co Ltd* [1986] 2 EGLR 144, 279 Estates Gazette 1355, CA.

8 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC.

9 See *Routestone Ltd v Minorities Finance Ltd* [1997] 1 EGLR 123, [1996] NPC 83. See also *Huish v Ellis* [1995] BCC 462, [1995] NPC 3, where it was suggested that the weight of authority was in favour of a mortgagee being liable where he employs an agent who is negligent.

10 *Routestone Ltd v Minorities Finance Ltd* [1997] 1 EGLR 123, [1996] NPC 83.

11 *Davey v Durrant, Smith v Durrant* (1857) 1 De G & J 535 at 553; *Thurlow v Mackeson* (1868) LR 4 QB 97; *Bettyes v Maynard* (1883) 31 WR 461, CA; *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 413, CA; *Kennedy v De Trafford* [1897] AC 180, HL. See also *Belton v Bass, Ratcliffe and Gretton Ltd* [1922] 2 Ch 449, where the purchaser was given a right to call on the mortgagee to repurchase. In *Thurlow v Mackeson* above, the whole purchase price, except the deposit, was left on mortgage.

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460. Different securities held by one mortgagee.

Where different properties are mortgaged by different mortgagors to the same mortgagee, and a sale of the two properties together is beneficial, both may be sold together and the purchase money apportioned¹. Where the properties are quite separate, evidence is required that the joint sale will produce a higher price; where they are united, for example a house and a garden, or are undivided shares of the same property, this is not necessary; and the apportionment must be made on the advice of a competent person².

1 *Hiatt v Hillman* (1871) 19 WR 694; *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 ChD 802.

2 *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 ChD 802 at 816.

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461. Conditions of sale.

A mortgagee is entitled to sell upon such conditions as he thinks suitable for securing a sale of the property, and the sale is not invalidated by the insertion of any condition in ordinary use, notwithstanding that in a sense it may be depreciatory¹. He is entitled to use stringent conditions if these are required by the state of the title². Express powers usually provide for the mortgagee selling subject to such conditions as he thinks fit³, and similar provision is made in regard to the statutory powers⁴. The mortgagee is not answerable for any involuntary loss happening in or about the exercise or execution of the statutory power of sale or of any trust connected with it or of any power or provision contained in the mortgage deed⁵.

1 *Falkner v Equitable Reversionary Society* (1858) 4 Drew 352. See also *Hobson v Bell* (1839) 2 Beav 17.

2 *Kershaw v Kalow* (1855) 1 Jur NS 974. As to conditions of sale see generally **SALE OF LAND** vol 42 (Reissue) PARA 76 et seq.

3 See PARA 440.

4 See the Law of Property Act 1925 s 101(1)(i); and PARA 444.

5 See the Law of Property Act 1925 s 106(3). The practical value of this statutory protection is doubtful.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(4) SALE OUT OF COURT/(vi) Mode of Exercise of the Power/462. Right of sale as between successive incumbrancers.

462. Right of sale as between successive incumbrancers.

Where there are successive mortgages, the first mortgagee may exercise his power of sale without the concurrence of the subsequent mortgagees, but he must account to them for the surplus sale money¹. A first mortgagee may buy a subsequent incumbrance at a reduced price without communicating to the subsequent incumbrancer an anticipated advantageous sale; and the sale, if afterwards effected, will be valid². If the second mortgagee exercises his power of sale, he can sell subject to the first mortgage³; or he can sell free from it⁴, either with the consent of the first mortgagee, who will be paid off out of the purchase money and will concur in the conveyance to the purchaser, or under the statutory power of sale⁵. In the latter case,

application⁶ should be made to the court to allow payment into court of an amount sufficient to meet the mortgage debt and any interest due on it⁷, and of such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments⁸. The further sum must not exceed one-tenth of the original amount paid in, unless the court for special reason thinks fit to require a larger additional amount⁹. Although the additional sum to be paid in is not intended to cover depreciation of investments, it seems that this risk can be taken into account¹⁰. If the sum paid in proves deficient, the mortgagee can follow the remainder of the proceeds of sale¹¹. On the application being made, the court may, if it thinks fit, direct or allow payment into court¹². Thereupon the court may, if it thinks fit, and either after or without any notice to the incumbrancer¹³, as it thinks fit, declare the land to be freed from the mortgage¹⁴, and make any order for conveyance, or vesting order, proper for giving effect to the sale or exchange¹⁵; but the vendor is not estopped from alleging subsequently that the incumbrance is statute-barred¹⁶.

1 See PARAS 471-474.

2 *Dolman v Nokes* (1855) 22 Beav 402; affd (1856) 27 LTOS 178, CA.

3 See *Manser v Dix* (1857) 8 De GM & G 703.

4 *Kaolim Private Ltd v United Overseas Land Ltd* [1983] 1 WLR 472, 127 Sol Jo 241, PC.

5 See the Law of Property Act 1925 s 101(1); and PARA 443.

6 The court may dispense with service of notice of the application on the vendor or purchaser: see the Law of Property Act 1925 s 50(4). As to the procedure on an application see PARA 626.

7 See the Law of Property Act 1925 s 50(1)(b). The amount to be paid in is not limited to the bare amount of mortgage debt; the court may direct payment in of such amount as in the court's opinion is sufficient when invested in government securities to meet the mortgage debt and any interest on it: *Re Wilberforce's Trusts, Wilberforce v Wilberforce* [1915] 1 Ch 94.

8 See the Law of Property Act 1925 s 50(1). Section 50 applies to sales or exchanges whenever made, and to incumbrances whether created by statute or otherwise: see s 50(6). Application may be made under s 50 where land subject to any incumbrance, whether immediately realisable or payable or not, is sold or exchanged by the court or out of court and may be made by any party to the sale or exchange: see s 50(1). As to the meaning of 'incumbrance' see PARA 223 note 4. As to the meaning of 'land' see PARA 104 note 2.

9 See the Law of Property Act 1925 s 50(1); and *Milford Haven Rly and Estate Co v Mowatt, Re Lake and Taylor's Mortgage, Spain v Mowatt* (1884) 28 ChD 402.

10 See the Law of Property Act 1925 s 50(1); and *Milford Haven Rly and Estate Co v Mowatt, Re Lake and Taylor's Mortgage, Spain v Mowatt* (1884) 28 ChD 402.

11 *Re Wilberforce's Trusts, Wilberforce v Wilberforce* [1915] 1 Ch 94.

12 See the Law of Property Act 1925 s 50(1). The court's discretion ought not, it seems, to be exercised by a master, at least where the amount involved is large: *Re Wilberforce's Trusts, Wilberforce v Wilberforce* [1915] 1 Ch 94 at 100.

13 As to the meaning of 'incumbrancer' see PARA 223 note 4.

14 As to the meaning of 'mortgage' see PARA 101 note 4.

15 Law of Property Act 1925 s 50(2); and see *Dickin v Dickin* (1882) 30 WR 887; cf *Re Uplands, Portmore Road, Weybridge, Surrey* [1948] WN 165. The court may also:

10 (1) give directions for the retention and investment of the money in court and for the payment or application of its income (Law of Property Act 1925 s 50(2));

11 (2) declare all other land, if any, affected by the incumbrance (besides the land sold or exchanged) to be freed from the incumbrance, and this power may be exercised either after or without notice to the incumbrancer, and notwithstanding that on a previous occasion an order

relating to the same incumbrance has been made by the court which was confined to the land then sold or exchanged (s 50(3));

- 12 (3) after notice served on the persons interested in or entitled to the money or fund in court, direct its payment or transfer to the persons entitled to receive or give a discharge for the same, and generally give directions for the application or distribution of the capital or its income (s 50(5)).

16 *Re M'Swiney and Hartnett's Contract* [1921] 1 IR 178.

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463. Fixtures.

The sale of fixtures separately from the land is not authorised by a statutory power to sell the mortgaged property¹ or any part of it, or by an express power of sale² which does not in terms give that power, whether the fixtures are expressly mentioned in the mortgage³ or not⁴. Trade fixtures pass as part of the mortgaged property⁵.

1 As to the statutory power of sale see PARA 443.

2 As to express powers of sale see PARA 440 et seq.

3 *Re Brooke* [1894] 2 Ch 600.

4 *Re Yates, Batchelor v Yates* (1888) 38 ChD 112, CA. See also *Re Joyce, ex p Barclay* (1874) 9 Ch App 576; *Re Rogerstone Brick and Stone Co, Southall v Wescomb* [1919] 1 Ch 110, CA; *Hunter v Hunter* [1936] AC 222 at 248-249, HL, per Lord Hailsham LC; *Kay's Leasing Corp'n Pty Ltd v CSR Provident Fund Nominees Pty Ltd* [1962] VR 429.

5 *Southport and West Lancashire Banking Co v Thompson* (1887) 37 ChD 64, CA (mortgage of leaseholds by sub-demise). See also PARA 195. As to the statutory power of sale extending to fixtures see PARA 447.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(4) SALE OUT OF COURT/(vi) Mode of Exercise of the Power/464. Minerals.

464. Minerals.

In a mortgage deed executed after 31 December 1911 the mortgagee's statutory power of sale¹ includes power to sell the mortgaged² property or any part of it with an exception or reservation of all or any mines or minerals³, or to sell all or any mines and minerals apart from the surface⁴. The sale may be made with or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage and other powers, easements, rights and privileges for or connected with mining purposes in relation to the property remaining unsold or any part of it or to any property sold⁵. These powers apply, however, only if and so far as a contrary intention is not expressed in the mortgage deed and have effect subject to its terms and provisions⁶. In the absence of express or statutory power the mortgagee is not entitled to effect such sales⁷.

Where a mortgagee has a power of sale which has become exercisable but does not extend to the separate dealing with the land and the minerals⁸, the court may on his application authorise him and the persons deriving title under him to dispose: (1) of the land⁹ with the exception or reservation of all or any mines and minerals¹⁰; or (2) of all or any mines and minerals separately from the land¹¹, and with or without rights and powers of or incidental to the working, getting or carrying away of the minerals¹². The power so conferred has effect as if the same were contained in the mortgage¹³.

1 As to the meaning of 'mortgagee' see PARA 104 note 1. As to the statutory power of sale see PARA 443.

2 As to the meaning of 'mortgage' see PARA 101 note 4.

3 See the Law of Property Act 1925 s 101(2)(i). As to the meaning of 'mines and minerals' see PARA 104 note 2.

4 See the Law of Property Act 1925 s 101(2)(ii).

5 Law of Property Act 1925 s 101(2)(ii)(b). As to the power to impose restrictions and grant or reserve easements see PARA 465.

6 See the Law of Property Act 1925 s 101(4). The statutory forms may be varied or extended by the mortgage deed: see s 101(3).

7 *Buckley v Howell* (1861) 29 Beav 546. See also *Re Gladstone, Gladstone v Gladstone* [1900] 2 Ch 101 at 105, CA.

8 Eg where the mortgage was executed before 1 January 1912: see the Law of Property Act 1925 s 92(1) (s 92(1) numbered as such by the County Courts Act 1984 s 148(1), Sch 2 Pt II para 3); and the text to notes 1-3.

9 As to the meaning of 'land' see PARA 104 note 2.

10 See the Law of Property Act 1925 s 92(1)(a) (s 92(1) as so numbered: see note 8).

11 See the Law of Property Act 1925 s 92(1)(b) (s 92(1) as so numbered: see note 8).

12 See the Law of Property Act 1925 s 92(1)(a), (b) (s 92(1) as so numbered: see note 8).

13 Law of Property Act 1925 s 92(1) (as so numbered: see note 8).

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465. Easements and covenants.

In the absence of statutory power, the mortgagee may not, on a sale of part of the property, grant easements over, or impose restrictive covenants upon, the part remaining unsold, or reserve easements or the benefit of covenants over the part sold¹, save that a conveyance made in pursuance of such a sale has its ordinary effect with regard to apparent continuous easements. Hence it will give to the purchaser such rights of light and other easements as he would take without express mention if the mortgagee were selling as absolute owner².

Where the mortgage³ deed is executed after 31 December 1911, the mortgagee may, on the exercise of his statutory power of sale⁴ create restrictive covenants or conditions against either the part sold or the part remaining unsold⁵, and may on sale of the mortgaged property or any part of it, or of mines and minerals apart from the surface, grant or reserve rights of way and water, easements, rights and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part of it or any property sold⁶, and may

impose covenants on the purchaser to expend money on the land sold⁷. These powers apply only if and as far as a contrary intention is not expressed in the mortgage deed and have effect subject to its terms and conditions⁸.

1 See *Dayrell v Hoare* (1840) 12 Ad & El 356; *Born v Turner* [1900] 2 Ch 211.

2 *Born v Turner* [1900] 2 Ch 211. See also **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARAS 125, 233.

3 As to the meaning of 'mortgage' see PARA 101 note 4.

4 As to the statutory power of sale see PARA 443.

5 See the Law of Property Act 1925 s 101(2)(i). The covenants may be with respect to building on, or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing: see s 101(2)(i). As to the meanings of 'land' and 'mines and minerals' see PARA 104 note 2.

6 See the Law of Property Act 1925 s 101(2)(ii)(a).

7 See the Law of Property Act 1925 s 101(2)(ii)(c).

8 Law of Property Act 1925 s 101(4). The powers may be varied or extended by the mortgage deed: see s 101(3).

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(vii) Who may Purchase

466. Mortgagee cannot sell to himself.

A mortgagee cannot sell to himself, either alone or with others, nor to a trustee for himself¹. Unless there are different persons filling the positions of vendor and purchaser the transaction is not a sale at all, and is not an exercise of the power. The interposition of a trustee does not affect the substance of the transaction². The same principle prevents a sale to an agent, solicitor³ or employee acting for the mortgagee in the matter of the sale⁴; consequently, on a sale by a building society as mortgagee, a purchase by the secretary⁵ or other officer concerned with the conduct of the sale may be set aside⁶. If there is in fact no conflict between the interests of the purchaser and his duty to the mortgagee, the sale is not to be set aside⁷. The mortgagee may, however, sell to an employee⁸ or a solicitor who does not have conduct of the sale⁹. A sale where the purchaser employed the mortgagee's clerk to bid has been set aside¹⁰. A sale by the mortgagee to a company in which he is interested will not be impugned if the mortgagee exercises the power in good faith for the purpose of obtaining repayment and shows that he took reasonable precautions to secure a proper price¹¹. Where the mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale; but the mortgagor will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between a mortgagor and the purchaser for the sale to be set aside¹². If the sale is ordered by the court¹³, the mortgagee may be given liberty to make an offer for the property¹⁴.

1 *Downes v Grazebrook* (1817) 3 Mer 200; *Robertson v Norris* (1857) 1 Giff 421; *National Bank of Australasia v United Hand-in-Hand and Band of Hope Co* (1879) 4 App Cas 391 at 404, PC; *Henderson v Astwood, Astwood v*

Cobbold, Cobbold v Astwood [1894] AC 150, PC; *Williams v Wellingborough Borough Council* [1975] 3 All ER 462, [1975] 1 WLR 1327, CA (right of pre-emption in favour of local authority); *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978) 19 ALR 519, Aust HC.

2 *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 409, CA.

3 *Whitcomb v Minchin* (1820) 5 Madd 91; *Orme v Wright* (1839) 3 Jur 19; *Re Bloye's Trust* (1849) 1 Mac & G 488 at 494 (affd sub nom *Lewis v Hillman* (1852) 3 HL Cas 607); *Martinson v Clowes* (1882) 21 ChD 857 at 860. But see *York Buildings Co v MacKenzie* (1795) 8 Bro Parl Cas 42, HL, cited in *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, as to the position of an agent for the creditors who purchased an estate of the insolvent debtor at auction.

4 *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964.

5 *Martinson v Clowes* (1882) 21 ChD 857; affd (1885) 52 LT 706, CA.

6 *Hodson v Deans* [1903] 2 Ch 647.

7 *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964.

8 *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964.

9 *Guest v Smythe* (1870) 5 Ch App 551, where the solicitor's name appeared on the conditions of sale, but he was only solicitor to the mortgagee's creditor; *Nutt v Easton* [1899] 1 Ch 873, where the solicitor had acted for the mortgagee, but was not employed to effect a sale (affd on the question of laches [1900] 1 Ch 29, CA).

10 *Parnell v Tyler* (1833) 2 LJCh 195. See also *Orme v Wright* (1839) 3 Jur 19, questioning the validity of a purchase by an agent who had acted in effecting the mortgage and receiving interest.

11 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC. See also *Mortgage Express v Mardner* [2004] EWCA Civ 1859; *Bradford and Bingley plc v Ross* [2005] EWCA Civ 394.

12 *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC (inexcusable delay by the mortgagor in prosecuting his claim, and therefore the only remedy available was damages, and not an order to set the sale aside).

13 *Id* under the Law of Property Act 1925 s 91(2): see PARA 616.

14 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA.

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467. Later mortgagee may purchase.

There is no fiduciary relation between co-owners of the equity of redemption so as to prevent one from purchasing the property on his own account from the mortgagee¹, and for this purpose a second mortgagee is in the same position as a stranger, and obtains under the purchase a title free from any equity of redemption². It makes no difference that the second mortgagee is in possession³.

1 *Kennedy v De Trafford* [1897] AC 180, HL. See also *Nunes v District Registrar of Winnipeg Land Titles Office* [1971] 5 WWR 427, 21 DLR (3d) 97.

2 *Parkinson v Hanbury* (1860) 1 Drew & Sm 143 at 146 (this point was not dealt with on appeal (1865) 2 De GJ & Sm 450; affd (1867) LR 2 HL 1); *Shaw v Bunny* (1864) 33 Beav 494 (affd (1865) 2 De GJ & Sm 468); *Kirkwood v Thompson* (1865) 2 De GJ & Sm 613 at 618. See also *Rajah Kishendatt Ram v Rajah Mumtaz Ali Khan* (1879) LR 6 Ind App 145 at 160, PC; *Flower & Sons Ltd v Pritchard* (1908) 53 Sol Jo 178.

3 *Kirkwood v Thompson* (1865) 2 De GJ & Sm 613 at 619.

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(viii) Protection of Purchasers

468. Protection of purchasers from irregularity in sale.

In the absence of any provision for the protection of purchasers, evidence must be furnished that the event on which the power of sale is to arise has happened¹. Where a sale is made in exercise of the statutory power², the purchaser's title is not impeachable on the ground that:

- 46 (1) no case had arisen to authorise the sale³;
- 47 (2) due notice was not given⁴;
- 48 (3) the leave of the court, when required, was not obtained⁵; or
- 49 (4) the power was otherwise improperly or irregularly exercised⁶.

A purchaser is also, whether before or on conveyance⁷, not concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or whether the power is otherwise properly and regularly exercised⁸. A purchaser for value who does not have notice of an impropriety connected with the exercise of the power of sale is not affected by that impropriety merely because of a lack of good faith unconnected with the impropriety⁹.

However, any person damnified by the unauthorised, improper or irregular exercise of the power has his remedy in damages against the person exercising the power¹⁰. Unless a contrary intention appears, a conveyance on sale by a mortgagee¹¹ is deemed to have been made in exercise of the statutory power of sale¹².

The written receipt of the mortgagee is a sufficient discharge for any money arising from the exercise of his statutory power of sale or for any money or securities comprised in his mortgage¹³ or arising under it¹⁴.

1 *Hobson v Bell* (1839) 2 Beav 17 at 22, where the mortgagee's unsupported statutory declaration was held insufficient.

2 As to the statutory power of sale see PARA 443.

3 Law of Property Act 1925 s 104(2)(a). See also *Haddington Island Quarry Co Ltd v Huson* [1911] AC 727, PC.

4 Law of Property Act 1925 s 104(2)(b). As to notice see PARAS 454-455.

5 See the Law of Property Act 1925 s 104(2)(c).

6 See the Law of Property Act 1925 s 104(2)(d).

7 As to the meaning of 'conveyance' see PARA 194 note 1.

8 See the Law of Property Act 1925 s 104(2). As to the effect of notice of irregularity see PARA 469.

9 *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180, [2003] 1 WLR 964. As to the doctrine of notice see **EQUITY** vol 16(2) (Reissue) PARA 576 et seq.

10 See the Law of Property Act 1925 s 104(2).

11 As to the meaning of 'mortgagee' see PARA 104 note 1.

12 Law of Property Act 1925 s 104(3). Cf *Re Statutory Trusts Declared by Section 105 of the Law of Property Act 1925 affecting the Proceeds of Sale of Moat House Farm, Thurlby* [1948] Ch 191 at 194, sub nom *Young v Clarey* [1948] 1 All ER 197 at 199, per Harman J; *Re White Rose Cottage* [1965] Ch 940, [1965] 1 All ER 11, CA. As to the purchaser's lien see **LIEN** vol 68 (2008) PARA 866.

13 As to the meaning of 'mortgage' see PARA 101 note 4.

14 See the Law of Property Act 1925 s 107(1). See also s 113; and PARA 373. A person paying or transferring that money or those securities to the mortgagee is not concerned to inquire whether any money remains due on the mortgage: s 107(1). As to the payment to a solicitor or licensed conveyancer producing a deed containing a receipt see s 69; and PARA 368. See also **LEGAL PROFESSIONS** vol 66 (2009) PARA 787. See further **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 37; **SALE OF LAND** vol 42 (Reissue) PARA 315.

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469. Effect of notice of irregularity.

The effect of the statutory protection¹ is that the purchaser is exempted from any duty to make inquiries; and, provided that he has no notice of any irregularity, he is protected notwithstanding that an event giving rise to the power of sale has not occurred, and even though at the time of the sale the mortgage has been paid off². He is not, however, protected if he has actual notice³ of the irregularity⁴; consequently, he is not protected if the exercise of the power depends on a notice being given which in the circumstances cannot have been given⁵, although he is, perhaps, protected if the want of notice might have been waived by the mortgagor⁶, and he is protected if the want of notice has been in fact waived by the persons to whom it should have been given⁷. If the persons concerned propose to join in the conveyance in order to show the waiver, it seems that the purchaser cannot refuse to complete on the ground that the title offered is different from that which he had contracted to take⁸.

1 See PARA 468.

2 *Dicker v Angerstein* (1876) 3 ChD 600.

3 Actual notice includes 'blind eye' knowledge and imputed knowledge; constructive notice is not enough: see *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch), [2007] Ch 197, [2006] 3 All ER 1029 (partly rev'd on other grounds [2007] EWCA Civ 1303, [2008] Ch 244, [2007] All ER (D) 156 (Dec)). But see *Bailey v Barnes* [1894] 1 Ch 25 at 30, 34, CA, a decision on the Conveyancing Act 1881 s 21 (repealed) where constructive notice was regarded as sufficient. As to the doctrine of notice see **EQUITY** vol 16(2) (Reissue) PARA 576 et seq.

4 See *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310 at 318.

5 *Parkinson v Hanbury* (1860) 1 Drew & Sm 143, where the mortgagor, to whom a three months' notice was to be given, was dead, and no representative had been appointed (the point was not dealt with on appeal (1865) 2 De GJ & Sm 450; affd (1867) LR 2 HL 1). See also *Selwyn v Garfit* (1888) 38 ChD 273, CA (notice could only be given after default, and the necessary period had not elapsed); and PARA 455.

6 *Selwyn v Garfit* (1888) 38 ChD 273 at 285, CA, per Bowen LJ.

7 *Re Thompson and Holt* (1890) 44 ChD 492.

8 *Re Thompson and Holt* (1890) 44 ChD 492; but cf *Forster v Hoggart* (1850) 15 QB 155, where it was held that the purchaser was not bound to take a title depending on waiver.

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470. Protection of purchasers of registered land.

For the purpose of preventing the title of a disponee of registered land being questioned, a person's right to exercise owner's powers¹ in relation to a registered estate is to be taken to be free from any limitation affecting the validity of the disposition which is not reflected by an entry on the register or imposed by or under the Land Registration Act 2002².

1 As to a mortgagee's right to exercise owner's powers see PARA 443.

2 See the Land Registration Act 2002 s 26; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 909.

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(ix) Application of Proceeds of Sale

471. Effect of sale.

A sale under a power of sale destroys the equity of redemption in the mortgaged property¹. Consequently, the sale defeats the rights of all subsequent incumbrancers, whose remedy then is only against the proceeds of sale². The sale constitutes the mortgagee exercising the power of sale as trustee of the surplus proceeds, if any, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor³. A mortgagee who has contracted to sell but, before the land has become vested in the purchaser, has rescinded the contract is not accountable to the mortgagor for purchase money which he has never received⁴. In the absence of special provision in the power of sale, the above principles determine the application of the proceeds, but such provision is contained in the statutory powers and usually in express powers⁵.

1 See PARAS 107, 334. As to the effect of the conveyance see PARAS 445-447.

2 *Directors etc of South Eastern Ry Co v Jortin* (1857) 6 HL Cas 425 at 435.

3 *Wilson v Tooker* (1714) 5 Bro Parl Cas 193, HL (mortgage of exchequer annuities); *Rajah Kishendatt Ram v Rajah Mumtaz Ali Khan* (1879) LR 6 Ind App 145 at 160, PC (mortgage of land). See also *Harrison v Hart* (1726) 2 Eq Cas Abr 6 (mortgage of stock); *Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1970] 3 All ER 950, [1971] 1 WLR 43, CA.

4 *Wright v New Zealand Farmers Co-operative Association of Canterbury Ltd* [1939] AC 439, [1939] 2 All ER 701, PC.

5 See further PARAS 472-474.

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472. Application of money from sale under statutory powers.

Money arising from a sale is applicable in the first instance to the discharge of any prior incumbrances to which the sale is not made subject or to the payment into court of a sum to meet any prior incumbrance¹. The balance or the whole, as the case may be, is held by the mortgagee² in trust to be applied, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale, or any attempted sale, or otherwise and, secondly, in discharge of the mortgage money³, interest and costs, and other money, if any, due under the mortgage⁴; and the residue is to be paid to the person entitled to the mortgaged property or authorised to give receipts for the proceeds of sale⁵. For the purposes of this requirement, in its application to the proceeds of sale of registered land, a person is taken to have notice of anything in the register immediately before the disposition on sale⁶.

A mortgagee can abandon or waive his security and rely on the personal covenant for payment. The mortgagor has no right to insist that a mortgagee enforce his debt against the security, or to insist on the order in which successive mortgaged debts are satisfied unless he has the benefit of an express provision precluding the alteration of priorities of mortgages⁷. A mortgagee who sells under his statutory power of sale after the rights of the mortgagor and puisne mortgagees have become statute-barred is entitled to retain the whole proceeds; he is the only person entitled to the property and to give a good receipt⁸. A second mortgagee who is unable to enforce his claim by bringing proceedings is not entitled to the property or authorised to give a good receipt⁹. A mortgagee is not, however, entitled to retain the whole proceeds on the ground that he has a claim against the mortgagor other than for the debt secured by the mortgage¹⁰.

Money received by a mortgagee under his mortgage, or from the proceeds of securities comprised in his mortgage, is to be applied in the same manner as proceeds of sale, except that for costs incident to the sale are substituted costs of recovering and receiving the money or securities or the conversion of the securities into money¹¹. In the case of a mortgage of trust funds, the trustees are not bound to pay a mortgagee more than the amount due on his mortgage¹².

1 See the Law of Property Act 1925 s 50; and PARA 462. As to the meaning of 'incumbrance' see PARA 223 note 4.

2 As to the meaning of 'mortgagee' see PARA 104 note 1.

3 As to the meaning of 'mortgage money' see PARA 104 note 1.

4 As to the meaning of 'mortgage' see PARA 101 note 4.

5 See the Law of Property Act 1925 s 105. As to costs of a vexatious claim after sale see *Re Smith's Mortgage, Harrison v Edwards* [1931] 2 Ch 168. Where a mortgagee sells property of a company subject to a fixed charge, the surplus is payable in accordance with the Law of Property Act 1925 s 105 and not to the preferential creditors even though the charge is contained in a debenture which also creates floating charges: *Re GL Saunders Ltd (in liquidation)* [1986] 1 WLR 215, [1986] BCLC 40. See also *Re H & K (Medway) Ltd, Mackay v IRC* [1997] 2 All ER 321, [1997] 1 WLR 1422; and **COMPANIES** vol 15 (2009) PARA 1334.

6 Land Registration Act 2002 s 54. As to the register see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 810.

7 *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472, [1991] 4 All ER 989, PC.

8 *Re Statutory Trusts Declared by Section 105 of the Law of Property Act 1925 affecting the Proceeds of Sale of Moat House Farm, Thurlby* [1948] Ch 191, sub nom *Young v Clarey* [1948] 1 All ER 197. As to puisne mortgages see PARA 117 note 5.

9 *C & M Matthews Ltd v Marsden Building Society* [1951] Ch 758, sub nom *Re Martin's Mortgage Trusts, C & M Matthews Ltd v Marsden Building Society* [1951] 1 All ER 1053, CA.

10 *Halifax Building Society v Thomas* [1996] Ch 217, [1995] 4 All ER 673, CA.

11 See the Law of Property Act 1925 s 107(2).

12 See *Re Bell, Jeffery v Sayles* [1896] 1 Ch 1, CA; *Hockey v Western* [1898] 1 Ch 350, CA; *Re Lloyd, Lloyd v Lloyd* [1903] 1 Ch 385 at 403, CA. See also **TRUSTS** vol 48 (2007 Reissue) PARA 742.

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473. Satisfaction of claims of subsequent mortgagees.

Where there are subsequent incumbrancers, their claim to receive the surplus proceeds is prior to that of the mortgagor, and if the first mortgagee has notice, he is liable to them if he pays the proceeds to the mortgagor¹. It seems that knowledge of the existence of a subsequent incumbrance acquired by the first mortgagee's solicitor does not necessarily constitute constructive notice to the first mortgagee unless the solicitor acquired his knowledge in his capacity as such². The mortgagee should, however, search the register in the case of registered land or, in the case of unregistered land, the land charges register for puisne mortgages³, as registration in the land charges register constitutes actual notice⁴. If there is a second mortgagee, the whole of the proceeds must be paid to him, and his receipt is a good discharge⁵.

If there is any doubt as to the persons entitled to the surplus proceeds, the first mortgagee may pay the surplus into court⁶.

A mortgagee may be liable for breach of duty if he allows the surplus to remain in his solicitor's hands without the authority of the mortgagor or subsequent incumbrancer⁷.

1 *West London Commercial Bank v Reliance Building Society* (1885) 29 ChD 954 at 962, CA.

2 *Thorne v Heard and Marsh* [1895] AC 495 at 501, 505, HL. Cf the Law of Property Act 1925 s 199(1)(ii); and PARA 279. As to constructive notice see **EQUITY** vol 16(2) (Reissue) PARAS 580-583.

3 See under the Land Charges Act 1972 s 2(1), (4)(i); see PARA 260; and **LAND CHARGES** vol 26 (2004 Reissue) PARAS 628-629.

4 See the Law of Property Act 1925 s 198(1); and PARA 261.

5 See the Law of Property Act 1925 s 107(1). See also *Re Thomson's Mortgage Trusts, Thomson v Bruty* [1920] 1 Ch 508, distinguished in *C & M Matthews Ltd v Marsden Building Society* [1951] Ch 758, sub nom *Re Martin's Mortgage Trusts, C & M Matthews Ltd v Marsden Building Society* [1951] 1 All ER 1053, CA.

6 See *Re Walhampton Estate* (1884) 26 ChD 391. See also *Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1970] 3 All ER 950, [1971] 1 WLR 43, CA.

7 *Thorne v Heard* [1893] 3 Ch 530 at 534; affd sub nom *Thorne v Heard and Marsh* [1895] AC 495, HL (see note 2). See also **LEGAL PROFESSIONS** vol 66 (2009) PARA 791. As to the nature of the duty owed by the mortgagee see PARA 392.

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474. Mortgagee as express or constructive trustee.

Where the power of sale, whether express or statutory, provides that the surplus proceeds are to be held in trust for the mortgagor¹, the mortgagee becomes a trustee of the surplus proceeds in his hands²; otherwise he becomes a trustee only on proof that there is a surplus in his hands³. The mortgagee is not a trustee of the surplus for the mortgagor or subsequent incumbrancers if before the sale their rights had become statute-barred⁴. On the sale being completed, interest ceases to run against the mortgagor⁵, unless otherwise agreed⁶, and the mortgagee is charged interest in equity on the balance in his hands⁷. Interest is likely to be awarded either at a rate linked to some independent rate such as bank base rate⁸, the short term investment account rate⁹, or at the rate of return which the mortgagee was able to obtain in his business¹⁰.

1 As to the application of money resulting from the exercise of the statutory power of sale see PARA 472.

2 *Locking v Parker* (1872) 8 Ch App 30 at 40; *Banner v Berridge* (1881) 18 ChD 254 at 269; *Re Bell, Lake v Bell* (1886) 34 ChD 462; *Re Thomson's Mortgage Trusts, Thomson v Bruty* [1920] 1 Ch 508, distinguished in *C & M Matthews Ltd v Marsden Building Society* [1951] Ch 758, sub nom *Re Martin's Mortgage Trusts, C & M Matthews Ltd v Marsden Building Society* [1951] 1 All ER 1053, CA. See also *Thorne v Heard and Marsh* [1895] AC 495, HL; and **LIMITATION PERIODS** vol 68 (2008) PARA 1152.

3 *Banner v Berridge* (1881) 18 ChD 254 at 269; and see *Gouthwaite v Rippon* (1838) 8 LJCh 139; *Tanner v Heard* (1857) 23 Beav 555; *Charles v Jones* (1887) 35 ChD 544. See also *Ocean Accident and Guarantee Corp'n Ltd and Hewett v Collum and Archdall* [1913] 1 IR 328. As to such a trust being sufficient to prevent time running see **LIMITATION PERIODS** vol 68 (2008) PARA 1152.

4 *Re Statutory Trusts Declared by Section 105 of the Law of Property Act 1925 affecting the Proceeds of Sale of Moat House Farm, Thurlby* [1948] Ch 191, sub nom *Young v Clarey* [1948] 1 All ER 197. As to the principle that the rights of a mortgagor of land and of persons claiming through him are normally barred and their titles extinguished after the mortgagee has been in possession for 12 years see **LIMITATION PERIODS** vol 68 (2008) PARAS 1095, 1129.

5 *West v Diprose* [1900] 1 Ch 337 at 340.

6 As to contractual provisions regarding interest see PARAS 215-220.

7 *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455. Interest will run from a time after the sale sufficient to enable the mortgagee to ascertain the surplus. As to interest on money generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1303 et seq.

8 *Wallersteiner v Moir (No 2)* [1975] QB 373, 508n, [1975] 1 All ER 849.

9 See *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92.

10 *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455.

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(5) APPOINTMENT OF RECEIVER OUT OF COURT

475. Appointment of receiver under express power.

In order to give the mortgagee the advantages, without the liabilities, of being in possession, a receiver may be appointed at the time of the mortgage and as part of the security, or, more commonly, subsequently under an express power in the mortgage deed. In the former case the appointment is made by the mortgagor with the mortgagee's concurrence either by a separate

deed, which can be given to the receiver as evidence of his authority, or in the mortgage deed. In the latter case the appointment is made by the mortgagee, either by writing under hand or by deed, according to the terms of the power, and in either case it is provided that the receiver is to be the mortgagor's agent¹. Receivers are more commonly appointed under mortgages and debentures over the property of companies, and such receiverships are subject to statutory regulation². Although a mortgagee may have a receiver at the mortgagor's expense, he cannot stipulate to be receiver of the rents and profits himself with a commission³.

The deed of appointment, or the power and appointment under the power, now usually:

- 50 (1) gives the receiver the power to do anything the mortgagor might do;
- 51 (2) contains an irrevocable power of attorney enabling him to execute deeds and sell the mortgaged property⁴; and
- 52 (3) provides for application of sums received.

Where successive incumbrancers join in a deed appointing a receiver and declaring trusts of the receipts, with an ultimate trust for the mortgagor, an incumbrancer subsequent to the deed is entitled to the benefit of it, but in proceedings for an account or for the execution of the trusts he must make all the prior incumbrancers parties⁵.

1 *Jefferys v Dickson* (1866) 1 Ch App 183 at 190; *Law v Glenn* (1867) 2 Ch App 634 at 641; *Jones v Smith* (1841) 1 Hare 43 at 71; *Lord Kensington v Bouverie* (1855) 7 De GM & G 134 at 157; *Owen & Co v Cronk* [1895] 1 QB 265, CA; *Bissell v Ariel Motors (1906) Ltd and Walker* (1910) 27 TLR 73. As to the practice of making the receiver the mortgagor's agent see *Gaskell v Gosling* [1896] 1 QB 669 at 692, CA, per Rigby LJ. As to persons for whom a receiver appointed by debenture holders acts as agent see *Deyes v Wood* [1911] 1 KB 806, CA; and **COMPANIES** vol 15 (2009) PARA 1340. As to the position of a receiver appointed by the court see **COMPANIES** vol 15 (2009) PARA 1361 et seq; **RECEIVERS** vol 39(2) (Reissue) PARA 309 et seq.

2 See the Insolvency Act 1986 ss 33-49; and **COMPANIES** vol 15 (2009) PARA 1340 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 403 et seq, 429-430.

3 *Bonithon v Hockmore* (1685) 1 Vern 316; *Chambers v Goldwin* (1801) 9 Ves 254 at 271; *Langstaffe v Fenwick*, *Fenwick v Langstaffe* (1805) 10 Ves 405; *Lord Trimleston v Hamill* (1810) 1 Ball & B 377; *Leith v Irvine* (1833) 1 My & K 277; *Eyre v Hughes* (1876) 2 ChD 148 at 161. See also PARA 748.

4 See eg *Phoenix Properties v Wimpole Street Nominees* [1992] BCLC 737.

5 *Ford v Rackham* (1853) 17 Beav 485; *Jefferys v Dickson* (1866) 1 Ch App 183.

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476. General statutory powers.

The mortgagee¹ has statutory power, when the mortgage money² has become due, to appoint a receiver of the income of the mortgaged property or of any part of it³. If a mortgaged property consists of an interest in income or of a rentcharge⁴ or an annual or other periodical sum, a receiver may be appointed of that property or any part of it⁵. The statutory power may be excluded⁶ or varied or extended by the mortgage deed⁷. It is now usually varied to remove the statutory restrictions and to give extensive powers to the receiver⁸. The power to appoint a receiver must not be exercised until the mortgagee has become entitled to exercise the statutory power of sale⁹. The appointment of such person as the mortgagee thinks fit may be made by writing under the mortgagee's hand¹⁰, and the receiver may be removed and a new

receiver appointed from time to time in like manner¹¹. The power is exercisable even where the mortgagee has gone into possession¹².

1 As to the meaning of 'mortgagee' see PARA 104 note 1.

2 As to the meaning of 'mortgage money' see PARA 104 note 1.

3 See the Law of Property Act 1925 s 101(1)(iii). Save as otherwise provided, s 101 applies where the mortgage deed is executed after 31 December 1881: s 101(5). As to the meaning of 'mortgage' see PARA 101 note 4. In the case of a registered charge, the power is not exercisable until the charge is registered: *Lever Finance Ltd v Needleman Property Trustee* [1956] Ch 375, [1956] 2 All ER 378. As to the receipt of rent creating a tenancy by estoppel binding on the mortgagee see PARA 300.

4 As to the meaning of 'rentcharge' see PARA 338 note 7.

5 Law of Property Act 1925 s 101(1)(iii).

6 See the Law of Property Act 1925 s 101(4).

7 See the Law of Property Act 1925 s 101(3).

8 A power of sale is not an extension of the statutory powers, but an express power: see *Phoenix Properties v Wimpole Street Nominees* [1992] BCLC 737.

9 See the Law of Property Act 1925 s 109(1). As to when the statutory power of sale is exercisable see PARAS 453-457. As to appointment by a mortgagee in possession see PARA 616.

10 See the Law of Property Act 1925 s 109(1). As to the meaning of 'writing' see PARA 454 note 3.

11 See the Law of Property Act 1925 s 109(5).

12 *Refuge Assurance Co Ltd v Pearlberg* [1938] Ch 687, [1938] 3 All ER 231, CA.

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477. Duties of mortgagee.

A mortgagee owes a general duty to subsequent incumbrancers and to the mortgagor to use his powers for the sole purpose of securing repayments of the moneys owing under his mortgage and a duty to act in good faith¹. The mortgagee can choose when to appoint a receiver having regard to his own interests even though the timing of the appointment may be disadvantageous to the mortgagor or unsecured creditors². It may well be that a mortgagee who appoints a receiver and manager, knowing that the receiver and manager intends to exercise his powers for the purpose of frustrating the activities of a second mortgagee or for some other improper purpose or who fails to revoke the appointment of a receiver and manager when the mortgagee knows that the receiver and manager is abusing his powers, may himself be guilty of bad faith³. The mortgagee is not otherwise responsible for what a receiver does whilst he is the mortgagor's agent unless the mortgagee directs or interferes with the receiver's activities⁴. The mortgagee is responsible for what a receiver does whilst he is the mortgagee's agent and acting as such⁵.

1 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC. As to the general duties owed by a mortgagee see PARA 392.

² *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278, 2 BCC 98, 910 (on appeal [1991] BCLC 36, [1986] 1 FTLR 329, CA); *Re Potters Oils Ltd (No 2)* [1986] 1 All ER 890, [1986] 1 WLR 201.

³ *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC.

⁴ *American Express International Banking Corp v Hurley* [1985] 3 All ER 564, [1986] BCLC 52; *Standard Chartered Bank v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA.

⁵ *American Express International Banking Corp v Hurley* [1985] 3 All ER 564, [1986] BCLC 52. The receiver may become the mortgagee's agent following the bankruptcy or liquidation of the mortgagor: see *American Express International Banking Corp v Hurley* above; and PARA 480.

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478. Receiver's position.

A receiver appointed under the statutory power¹ is deemed to be the mortgagor's² agent and the mortgagor is solely responsible for his acts or defaults unless the mortgage³ deed otherwise provides⁴, but the agency may be modified by the terms of the mortgage deed⁵. A receiver who, although originally appointed by the mortgagee under the statutory power, is subsequently appointed by the court⁶, ceases to be the mortgagor's agent⁷.

The mortgagor's death does not operate as a revocation of the power to appoint a receiver⁸. The receiver may be permitted to sue in the name of the mortgagor's personal representatives on giving indemnity⁹.

The agency of a receiver is not an ordinary agency¹⁰. It is primarily a device to protect the mortgagee or debenture holder¹¹. Thus the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor¹². The relationship set up by the debenture and the appointment of the receiver is tripartite and involves the mortgagor, the receiver and the debenture holder¹³. The receiver is appointed by the debenture holder, but the mortgagor will have to pay the receiver's fees¹⁴. Further, the mortgagor cannot dismiss the receiver since that power is reserved to the debenture holder as another of the contractual terms of the loan¹⁵. The mortgagor cannot instruct the receiver how to act in the conduct of the receivership¹⁶. There is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only¹⁷. The equitable duty is owed to the mortgagee as well as the mortgagor¹⁸. Although the receiver is the agent of the mortgagor he owes fiduciary duties to the debenture holder who has a right, as against the receiver, to be put in possession of all the information concerning the receivership available to the receiver¹⁹.

¹ As to the statutory power of appointment see PARA 476.

² As to the meaning of 'mortgagor' see PARA 104 note 1.

³ As to the meaning of 'mortgage' see PARA 101 note 4.

⁴ Law of Property Act 1925 s 109(2). See also *Portman Building Society v Gallwey* [1955] 1 All ER 227, [1955] 1 WLR 96. A receiver is not the 'owner' of the mortgaged premises within the meaning of the London Building Act 1930: see *Solomons v R Gertzenstein Ltd* [1954] 2 QB 243, [1954] 2 All ER 625, CA.

⁵ *Richards v Kidderminster Overseers* [1896] 2 Ch 212 at 220.

⁶ As to the appointment of a receiver by the court see PARA 560 et seq.

7 *Hand v Blow* [1901] 2 Ch 721 at 732, CA. Cf *Lever Finance Ltd v Needleman Property Trustee* [1956] Ch 375, [1956] 2 All ER 378, where the receiver was held to be the mortgagee's agent until the mortgagee was registered as proprietor of the charge. As to the effect of payment of interest out of rent by the receiver see **LIMITATION PERIODS** vol 68 (2008) PARA 1099.

8 *Re Hale, Lilley v Foad* [1899] 2 Ch 107 at 117, CA.

9 *Fairholme and Palliser v Kennedy* (1890) 24 LR Ir 498.

10 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

11 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

12 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

13 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

14 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

15 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

16 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

17 *Medforth v Blake* [2000] Ch 86; *Raja v Austin Gray* [2002] EWCA Civ 1965, [2003] Lloyd's Rep PN 126, [2003] 1 EGLR 91; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

18 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

19 *Re Magadi Soda Co Ltd* (1925) 41 TLR 297, 94 LJCh 217. As to the ownership of documents created by receivers see *Gomba Holdings Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

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479. Duties of receivers to mortgagor and others.

A receiver and manager owes the same duty in equity to the mortgagor, all subsequent incumbrancers and guarantors as the mortgagee¹ to exercise his powers in good faith and for the purpose of obtaining repayment of the debt owing to the mortgagee. In a number of respects however, a receiver is in a very different position to the mortgagee: whilst a mortgagee has no duty at any time to exercise his powers to enforce his security, a receiver has no right to remain passive if that course would be damaging to the interests of the mortgagor or mortgagee². In the absence of a provision to the contrary in the mortgage or in his appointment, the receiver is to be active in the protection and preservation of the charged property over which he is appointed³. Thus if the mortgaged property is let, the receiver is duty bound to inspect the lease and if the lease contains an upward only rent review, to trigger that rent review in due time⁴. His management duties ordinarily impose on him no general duty to exercise the power of sale⁵. However a duty may arise if for example the goods are perishable and a failure to do so would cause loss to the mortgagee and the mortgagor⁶.

A receiver exercising his power of sale also owes the same specific duties as the mortgagee⁷. The receiver is entitled (like the mortgagee) to sell the property in the condition in which it is without awaiting or effecting any increase in value or improvement in the property. The receiver is not obliged before sale to spend money on repairs⁸ to make the property more

attractive before marketing it⁹ or to 'work' an estate by refurbishing it¹⁰ or to apply for planning permission¹¹.

A receiver does not owe the mortgagor any duty comparable to the duty owed to a company by its own directors or managers¹². He is entitled, but not bound, to allow the company's business to be continued by himself or by the existing or other executives¹³. The decisions of the receiver and manager whether to continue the business or close down the business and sell assets chosen by him cannot be impeached if those decisions are taken in good faith while protecting the interests of the debenture holder in recovering the moneys due under the debenture, even though the decisions of the receiver and manager may be disadvantageous for the company¹⁴. The duties owed by a receiver and manager do not compel him to adopt any particular course of action, such as selling the whole or part of the mortgaged property, carrying on the business of the company or exercising any other powers and discretions vested in him¹⁵. The primary duty of the receiver is to the debenture holders and not to the company¹⁶. The primary objective of the receivership is to enforce the security by recouping the moneys which it secures from the income or assets of the company subject to the security, and when recoupment is complete to hand the remaining property back to the control of the company¹⁷.

If the receiver does decide to carry on the business, he owes a duty to take reasonable steps to do so profitably¹⁸.

Where a receiver is in breach of his duty to the mortgagor or guarantor while acting as agent of the mortgagee, he is liable to indemnify the mortgagee against his liability to the mortgagor or guarantor unless such liability is excluded in the contract of agency¹⁹.

1 As to the general duties owed by a mortgagee see PARA 392. As to the appointment of a receiver see PARAS 475-476.

2 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

3 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

4 *Knight v Lawrence* [1991] 1 EGLR 143, [1993] BCLC 215; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

5 See *Routestone Ltd v Minorities Finance Ltd* [1997] BCC 180, 187g; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997; *Bell v Long* [2008] EWHC 1273 (Ch), [2008] 2 BCLC 706, [2008] BPIR 1211, [2008] All ER (D) 179 (Jun).

6 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

7 *Downsview Nominees Ltd v First City Corp'n Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *Standard Chartered Bank v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997. As to the nature of the duty see PARA 458.

8 *Meftah v Lloyds TSB Bank plc* [2001] 2 All ER (Comm) 741, 744, 766 per Lawrence Collins J; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

9 *Garland v Ralph Pay & Ransom* [1984] 2 EGLR 147, 151 per Nicholls J; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

10 *Routestone Ltd v Minorities Finance Ltd* [1997] BCC 180, 195 per Jacob J; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

11 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

12 *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 at 661-663, [1955] 2 All ER 775 at 790-791, CA, per Jenkins LJ; *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, [1993] 3 All ER 626, PC. As to a director's duty to a company see **COMPANIES** vol 14 (2009) PARA 532 et seq.

13 *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 312-313, [1993] 3 All ER 626 at 635, PC. See also *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

14 *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 312-313, [1993] 3 All ER 626 at 635, PC. See also *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

15 *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 314, [1993] 3 All ER 626 at 636, PC. See also *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

16 *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 315, [1993] 3 All ER 626 at 635, PC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997. See also *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

17 *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 315, [1993] 3 All ER 626 at 637, PC; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997.

18 *Medforth v Blake* [2000] Ch 86, [1999] 3 All ER 97, CA.

19 *American Express International Banking Corpn v Hurley* [1985] 3 All ER 564, [1986] BCLC 52.

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480. Termination of receivership.

The mortgagor cannot dismiss the receiver since that power is reserved to the mortgagee¹. The receiver will, however, be displaced by the appointment of a receiver by a prior mortgagee. Liquidation of a company mortgagor does not terminate the receiver's appointment or powers, but does terminate his agency for the mortgagor². If the receiver continues to act, he normally acts as principal³ but may become the agent of a mortgagee who treats him as such⁴. Where an administration order has been made, any receiver of part of the company's property must vacate office on being required to do so by the administrator⁵.

1 *Gomba Holdings UK Ltd v Minorities Finance Ltd* [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

2 *Gosling v Gaskell* [1897] AC 575; *Sowman v David Samuel Trust Ltd (in liquidation)* [1978] 1 All ER 616, [1978] 1 WLR 22, CA; *American Express International Banking Corpn v Hurley* [1985] 3 All ER 564, [1986] BCLC 52, CA. See also **COMPANIES** vol 15 (2009) PARA 1355.

3 *Gosling v Gaskell* [1897] AC 575, HL.

4 *Re Wood Application* [1941] Ch 112, [1940] 4 All ER 306; *American Express International Banking Corpn v Hurley* [1985] 3 All ER 564, [1986] BCLC 52.

5 Insolvency Act 1986 s 8, Sch B1 para 41. Provision is also made for the rights and liabilities of a receiver who vacates office at the request of the administrator: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 157.

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481. Statutory powers of receivers.

The receiver has statutory power to demand and recover all the income of which he is appointed receiver by bringing proceedings, by distress¹ or otherwise, in the name either of the mortgagor or mortgagee², to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts and to exercise any powers which may have been delegated to him by the mortgagee³. After the appointment of a receiver the mortgagor cannot distrain, even though he alleges negligence on the receiver's part⁴; and a distress by him is illegal⁵. A person paying money to the receiver is not concerned to inquire whether any case has happened to authorise the receiver to act⁶. The receiver's power to distrain ceases, however, when the mortgagee's interest is determined⁷. The powers conferred on the administrative receiver⁸ of a company by the debentures by virtue of which he was appointed are deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) certain statutory powers⁹. An administrative receiver may apply to the court for an order permitting him to dispose of property free from certain securities¹⁰.

1 As from a day to be appointed the Law of Property Act 1925 s 109(3) is amended by the substitution for the word 'distress' of the words 'or under the Tribunals, Courts and Enforcement Act 2007 s 72(1) (commercial rent arrears recovery)': see Law of Property Act 1925 s 109(3) (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 s 86, Sch 14 paras 21, 22). At the date at which this volume states the law no such day had been appointed.

2 As to the meanings of 'mortgagor' and 'mortgagee' see PARA 104 note 1.

3 Law of Property Act 1925 s 109(3).

4 *Bayly v Went* (1884) 51 LT 764.

5 *Woolston v Ross* [1900] 1 Ch 788. As to estoppel by payment of rent by a tenant to a receiver see *Serjeant v Nash, Field & Co* [1903] 2 KB 304, CA; and **ESTOPPEL** vol 16(2) (Reissue) PARA 1037.

6 Law of Property Act 1925 s 109(4).

7 *Serjeant v Nash, Field & Co* [1903] 2 KB 304, CA (mortgage of leaseholds in breach of covenant in lease; lease determined by lessor; subsequent distraint by receiver appointed by mortgagee held illegal).

8 An administrative receiver is: (1) a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities; or (2) a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property: see the Insolvency Act 1986 s 29(2); and **COMPANIES** vol 15 (2009) PARA 1337.

9 See the Insolvency Act 1986 s 42(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 396. The powers referred to are those specified in Sch 1: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 163.

10 See the Insolvency Act 1986 s 43(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 398.

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482. Express powers of receiver.

A receiver appointed otherwise than under statute has only the powers conferred on him by his appointment, and, unless specially empowered to do so, may not sue or distrain in the name of the person entitled to sue or distrain, that is either the mortgagor or mortgagee according to the circumstances¹. A receiver appointed by debenture holders who, under the terms of the debentures, is entitled to take possession will be put into possession by the court as against the liquidator, even though if the court were asked to appoint a receiver it would appoint the liquidator². Receivers are usually given extensive powers in modern mortgages.

1 Where the receiver was empowered to distrain and the mortgagor attorned tenant to the receiver, this was held to justify distress by the receiver against the mortgagor in the receiver's own name: *Jolly v Arbuthnot* (1859) 4 De G & J 224. Attornment clauses are now in general invalid for the purpose of conferring powers of distress unless registered as bills of sale: see PARA 343. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1655.

2 *Re Henry Pound, Son and Hutchins* (1889) 42 ChD 402, CA; *Re Joshua Stubbs Ltd, Barney v Joshua Stubbs Ltd* [1891] 1 Ch 475, CA.

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483. Powers as to insurance and application of income.

If appointed under the statutory power¹, the receiver must, if so directed in writing² by the mortgagee³, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, out of the money received by him, any building, effects or property comprised in the mortgage⁴, whether affixed to the freehold or not, being of an insurable nature⁵.

Subject to the statutory provisions as to the application of insurance money⁶, the receiver must apply all money received by him as follows⁷:

- 53 (1) in discharge of all rents, taxes⁸, rates⁹ and outgoings affecting the mortgaged property¹⁰;
- 54 (2) in keeping down annual sums or other payments, and interest on all principal sums, having priority to the mortgage in right of which he is receiver¹¹;
- 55 (3) in payment of his commission, and of premiums on fire, life and other insurances, if any, properly payable under the mortgage deed or the Law of Property Act 1925, and the cost of executing necessary or proper repairs directed in writing by the mortgagee¹²;
- 56 (4) in payment of interest accruing due in respect of any principal money due under the mortgage¹³; and
- 57 (5) in or towards discharge of the principal money, if so directed in writing by the mortgagee¹⁴.

The receiver pays the residue, if any, to the person who, but for the receiver's possession, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property¹⁵. The statutory application of income may be extended by the mortgage deed so as, for instance, to authorise the receiver and manager of a business to pay unsecured debts¹⁶. The statutory duties in heads (4) and (5) above are for the mortgagee's benefit as well as the mortgagor's, and he may maintain a claim against the receiver for failure to perform them¹⁷. A receiver appointed by a mortgagee of a lease which the landlord claims to have forfeited is entitled to receive the income from the property and

discharge current outgoings, but his title to the balance is liable to be divested by a declaration that the lease has been forfeited¹⁸.

- 1 See the Law of Property Act 1925 s 109(1); and PARA 476.
- 2 As to the meaning of 'writing' see PARA 454 note 3.
- 3 As to the meaning of 'mortgagee' see PARA 104 note 1.
- 4 As to the meaning of 'mortgage' see PARA 101 note 4.
- 5 Law of Property Act 1925 s 109(7).
- 6 See the Law of Property Act 1925 s 108; and PARA 199.
- 7 Law of Property Act 1925 s 109(8). See *Portman Building Society v Gallwey* [1955] 1 All ER 227, [1955] 1 WLR 96. Appointments of receivers under receivership deeds or express powers contain similar provisions.
- 8 Tax includes VAT on rent paid to the receiver in respect of mortgaged property: *Sargent v Customs and Excise Comrs* [1994] 1 WLR 235, [1993] NPC 142; affd in part [1995] 1 WLR 821, [1995] 2 BCLC 34, CA.
- 9 The non-payment of rates by a receiver is not a breach of statutory duty for which the local authority can sue: *Liverpool Corp v Hope* [1938] 1 KB 751, [1938] 1 All ER 492, CA. See also *Ratford v Northavon District Council* [1987] QB 357, [1986] 3 All ER 193, CA. The position would be different if the receiver had dispossessed the mortgagor or taken possession in an independent capacity: *Ratford v Northavon District Council* above.
- 10 Law of Property Act 1925 s 109(8)(i). The purpose of s 109(8)(i) is to preserve the property in the interest of both the mortgagee and the mortgagor by ensuring that the normal outgoings are duly discharged: *Sargent v Customs and Excise Comrs* [1994] 1 WLR 235, [1993] NPC 142; affd in part [1995] 1 WLR 821, [1995] 2 BCLC 34, CA.
- 11 Law of Property Act 1925 s 109(8)(ii).
- 12 Law of Property Act 1925 s 109(8)(iii). See *White v Metcalf* [1903] 2 Ch 567; and PARA 946.
- 13 Law of Property Act 1925 s 109(8)(iv). The receiver must pay arrears of interest due at the time of his appointment, as well as interest accruing subsequently: *National Bank v Kenney* [1898] 1 IR 197.
- 14 Law of Property Act 1925 s 109(8)(v).
- 15 See the Law of Property Act 1925 s 109(8).
- 16 *Re Hale, Lilley v Foad* [1899] 2 Ch 107 at 118, CA.
- 17 *Leicester Permanent Building Society v Butt* [1943] Ch 308, [1943] 2 All ER 523, where the mortgagee was held entitled to an account.
- 18 *Official Custodian for Charities v Mackey (No 2)* [1985] 2 All ER 1016, [1985] 1 WLR 1308.

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484. Remuneration.

A receiver appointed under the statutory power¹ is entitled to retain out of any money received by him a commission at such rate, not exceeding 5 per cent on the gross amount of all money received, as is specified in his appointment, and, if no rate is specified, then at the rate of 5 per cent on that gross amount, or at such other rate as the court thinks fit to allow, on the receiver's application². The rate thus determined covers the receiver's remuneration and all

costs, charges and expenses incurred by him as receiver³. Appointments made otherwise than under the statutory provisions usually provide specially as to remuneration, and, if they do not, the receiver will be entitled to a proper remuneration as a quantum meruit⁴. The statutory limit on the remuneration of a receiver is usually excluded. The court can fix the remuneration of a receiver of the property of a company in liquidation on an application by the liquidator⁵ or on the taking of an account between the mortgagor and the mortgagee⁶.

1 See the Law of Property Act 1925 s 109(1); and PARA 476.

2 See the Law of Property Act 1925 s 109(6). Under this provision, where no rate has been provided for, the receiver is entitled to commission at the rate of 5% without making an application to court: *Marshall v Cottingham* [1982] Ch 82, [1981] 3 All ER 8.

3 See the Law of Property Act 1925 s 109(6). See also *Marshall v Cottingham* [1982] Ch 82, [1981] 3 All ER 8, where a receiver was appointed under a debenture which provided for payment of the 'costs of realisation' out of sums realised, and such costs did not fall to be paid out of the receivers commission as part of the 'costs, charges and expenses' incurred by him as receiver.

4 *Re Vimbos Ltd* [1900] 1 Ch 470.

5 See the Insolvency Act 1986 s 36; and **COMPANIES** vol 15 (2009) PARA 1356.

6 See *Gomba Holdings UK Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA.

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(6) RIGHTS AS REGARDS TITLE DEEDS

(i) Right to Custody

485. Mortgagee or chargee of freeholds or leaseholds.

Where freeholds are mortgaged, whether by demise or legal charge¹, a first mortgagee² has the same right to possession of documents as if his security included the fee simple³; and where leaseholds are mortgaged, whether by sub-demise or legal charge⁴, a first mortgagee has the same right to possession of documents as if his security had been effected by assignment⁵. A legal mortgagee who omits to inquire for the title deeds may be postponed to an earlier or subsequent incumbrancer⁶. The mortgage gives the mortgagee a property in all the deeds relating to the mortgaged land⁷, and a mortgagee with a good title to whom a forged copy of a genuine deed has been delivered can recover the genuine deed from a subsequent incumbrancer⁸.

1 See PARAS 190-191.

2 As to the meaning of 'mortgagee' see PARA 104 note 1.

3 See the Law of Property Act 1925 s 85(1) proviso.

4 See PARAS 190-191.

5 See the Law of Property Act 1925 s 86(1) proviso.

6 See PARA 282.

7 *Newton v Beck* (1858) 3 H & N 220 at 222.

8 *Newton v Beck* (1858) 3 H & N 220.

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486. Right as between tenant for life and mortgagee.

Where the property is settled land, the legal estate in fee simple is vested in the tenant for life, who holds it as trustee for all the persons entitled under the settlement¹, and he is entitled to possession of the title deeds². The court may, however, take charge of the deeds when they are in danger in the custody of the tenant for life³, and the trustees of the settlement are entitled to retain title deeds which they require for the purposes of their trusts⁴. A mortgagee of the beneficial life interest of a tenant for life, which is an equitable interest, is not entitled to the deeds and the tenant for life is prohibited from handing them over to him unless he is a mortgagee of the whole of the settled land to which the documents relate⁵. The mortgagee of the life interest has, however, the same rights with respect to the deeds as if the tenant for life had given to him a statutory acknowledgment and undertaking for production and safe custody of the deeds⁶.

1 See the Settled Land Act 1925 s 107(1); and **SETTLEMENTS** vol 42 (Reissue) PARA 775. As to the continued existence of settlements created before 1 January 1997 see PARA 167; and **SETTLEMENTS** vol 42 (Reissue) PARA 675.

2 He had the same right under the previous law when his legal estate was a life estate: *Garner v Hannington* (1856) 22 Beav 627. See also Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 445n. As to the right to custody of title deeds see **REAL PROPERTY** vol 39(2) (Reissue) PARA 87. The trustees of the settlement are not liable in any way on account of documents of title being placed in the possession of the tenant for life: see the Settled Land Act 1925 s 98(3); and **SETTLEMENTS** vol 42 (Reissue) PARA 892.

3 See *Leathes v Leathes* (1877) 5 ChD 221.

4 See *Clayton v Clayton* [1930] 2 Ch 12; and **SETTLEMENTS** vol 42 (Reissue) PARA 771; **TRUSTS** vol 48 (2007 Reissue) PARA 724. See also **REAL PROPERTY** vol 39(2) (Reissue) PARA 87.

5 See the Settled Land Act 1925 ss 111 proviso, 117(1)(xxi); and **SETTLEMENTS** vol 42 (Reissue) PARA 773. Under a mortgage of his life estate by the tenant for life before 1926, the mortgagee was entitled to have the deeds of the settled land handed to him.

6 See the Settled Land Act 1925 ss 111 proviso, 117(1)(xxi); and note 5.

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487. Right as between co-owners and mortgagee.

Apart from the statutory trusts affecting land held by co-owners¹, whichever one of them obtains the deeds is entitled to hold them, subject to the right of the others to have the deeds produced². Accordingly, a mortgagee of the interest of a co-owner is not entitled to the custody of the deeds as against another co-owner who has them in his possession³. Nor is a mortgagee entitled to custody of the deeds deposited by one co-owner by way of security without the

consent of the other⁴. The trustees under the statutory trusts are, however, entitled to hold the deeds, and a mortgagee will take them only when the mortgage is made by the trustees or by all the co-owners by virtue of their beneficial interests⁵.

1 See the Law of Property Act 1925 s 34; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 211.

2 *Foster v Crabb* (1852) 12 CB 136; *Wright v Robotham* (1886) 33 ChD 106, CA; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 443. See also *Lambert v Rogers* (1817) 2 Mer 489. But see *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA, where each joint tenant was entitled to joint custody.

3 See *Yea v Field* (1788) 2 Term Rep 708 (although the actual decision in that case may not have been correct: see Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 441).

4 *Thames Guaranty v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA.

5 See **REAL PROPERTY** vol 39(2) (Reissue) PARA 211.

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488. Right when power of sale exercisable.

As soon as the statutory power of sale has become exercisable¹, the mortgagee may demand and recover from any person, other than a person entitled in priority to himself, all the deeds and documents relating to the property or its title which a purchaser under the power of sale would be entitled to demand and recover from him².

1 As to the statutory power of sale see PARA 443. As to the conditions on which it becomes exercisable see PARAS 453-457.

2 See the Law of Property Act 1925 s 106(4). The reference in the text is apparently a reference to the deeds which the purchaser could recover from the holder of them after the sale.

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489. Right of equitable mortgagee by deposit.

An equitable mortgagee by deposit of deeds¹ is entitled to retain the deeds until payment or tender of the amount due on his security², and until then the mortgagor has no direct claim to recover the deeds; but if a proper tender has been made and refused, the mortgagor, in a claim for redemption or other suitable proceeding, may obtain an order for delivery of the deeds on payment into court of a stated sum sufficient to cover principal, interest and costs³.

1 It is no longer possible to create a mortgage by deposit of deeds: see PARAS 118, 367.

2 *Re Molton Finance Ltd* [1968] Ch 325 at 332-333, [1967] 3 All ER 843 at 845, CA, per Lord Denning MR.

3 *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 283, PC. See also *Mills v Finlay* (1839) 1 Beav 560.

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490. Right of mortgagee with bad title.

A mortgagee who has taken a bad title and is compelled to deliver up the deeds may keep the mortgage deed so as to be able to avail himself of the covenant for payment¹.

¹ *Opie v Godolphin* (1720) Prec Ch 548. As to the mortgagee's rights as regards a defective title see PARA 393.

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(ii) Liability for Production

491. Statutory liability of mortgagee.

A mortgagor¹, so long as his right to redeem subsists, is entitled from time to time, at reasonable times, on his request and at his own cost and on payment of the mortgagee's² costs and expenses in this behalf, to inspect and make copies of or extracts from the documents of title relating to the mortgaged property in the mortgagee's custody or power³. This right cannot be excluded by contract⁴. It seems that, where the mortgagee has sub-mortgaged, he must arrange for production by the sub-mortgagee⁵. Documents in a solicitor's possession are under his client's control⁶. Where a mortgagor is subject to a bankruptcy order, or an interim receiver has been appointed⁷, the mortgagee can be required to produce the deeds in bankruptcy proceedings⁸.

¹ As to the meaning of 'mortgagor' see PARA 104 note 1.

² As to the meaning of 'mortgagee' see PARA 104 note 1.

³ See the Law of Property Act 1925 s 96(1). Where in proceedings for the detention of title deeds the defendants pleaded that they held the deeds as equitable mortgagees, the plaintiffs were held entitled to inspect a memorandum of deposit of the deeds alleged to be held by the defendants: see *Owen v Nickson* (1861) 7 Jur NS 497 (a decision under the Evidence Act 1851 s 6 (now repealed)). As to disclosure and the inspection of documents in proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARAS 538-583. As to production of the deeds on a sale by the court see *Armstrong v Dixon* [1911] 1 IR 435. As to handing the deeds over on payment off see PARA 651.

⁴ See the Law of Property Act 1925 s 96(1).

⁵ See *Rogers v Rogers* (1842) 6 Jur 497.

⁶ *Fenwick v Reed* (1816) 1 Mer 114; *Bligh v Benson* (1819) 7 Price 205 at 207.

⁷ See under the Insolvency Act 1986 s 286: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 222 et seq.

⁸ See the Insolvency Act 1986 ss 366, 368; *Re White, ex p Caldecott* (1830) Mont 55; *Re Marks' Trust Deed* (1866) 1 Ch App 429; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 307.

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492. Statutory liability of estate owner.

The owner of the legal estate is liable to produce the deeds and furnish information to a mortgagee of an equitable interest in the land¹.

¹ See the Law of Property Act 1925 s 137(9); and **CHOSES IN ACTION** vol 13 (2009) PARA 58. See also *Compton v Earl Grey* (1826) 1 Y & J 154; *Re Cowin, Cowin v Gravett* (1886) 33 ChD 179.

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493. Liability apart from statute.

Apart from the statutory liability¹, a mortgagee, when the day fixed for redemption is past, is not bound to produce the deeds to the mortgagor except on payment of all money secured by the mortgage². Moreover the mortgagee may refuse to produce the deeds in proceedings between the mortgagor and a third person³, in which case secondary evidence of them can be given⁴. Although in general a mortgagee cannot be required to disclose the mortgagor's title, production may sometimes be ordered in favour of a third person in the mortgagor's absence⁵; and, similarly, a mortgagor may be ordered to produce copies of deeds to a third person⁶. Where, however, the mortgagee loses all title to the mortgaged land by lapse of time, the mortgagor can recover possession of the mortgage and other title deeds⁷.

¹ See PARA 491.

² *Browne v Lockhart* (1840) 10 Sim 420; *Greenwood v Rothwell* (1844) 7 Beav 291; *Cannock v Jauncey* (1853) 1 Drew 497 at 507; *Chichester v Marquis of Donegall* (1870) 5 Ch App 497; and see *Senhouse v Earl* (1752) 2 Ves Sen 450; *Sparke v Montriou* (1834) 1 Y & C Ex 103; *Jones v Jones* (1853) Kay App vi; *Burn v London and South Wales Coal Co and Risca Investment Co* (1890) 7 TLR 118. The decision in *Latimer v Neate* (1837) 4 Cl & Fin 570, HL, which appears to be authority to the contrary, was explained in *Browne v Lockhart* (1840) 10 Sim 420 and in *Glover v Hall* (1848) 2 Ph 484 at 490. Payment into court of the utmost amount due was not sufficient to give a right to production (*Postlethwaite v Blythe* (1818) 2 Swan 256; but see *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 283, PC); nor was the mortgagee bound to show the deeds to an intending purchaser (*Postlethwaite v Blythe* above) or transferee (*Damer v Earl of Portarlington* (1846) 15 Sim 380) unless the sale was being made in court (*Livesey v Harding* (1839) 1 Beav 343), or out of court with his consent (*Anon* (1729) Mos 246). A beneficiary who had mortgaged his interest to the trustee lost his ordinary right to production as against the trustee: *Johnston v Tucker* (1847) 11 Jur 382.

This rule was treated as an instance of the general rule that a defendant is not bound to produce his title deeds, and it therefore extended to the mortgage deed itself (*Beaumont v Foster* (1835) 5 LJCh 4; *Crisp v Platel* (1844) 8 Beav 62; *Dendy v Cross* (1848) 11 Beav 91), and to a transfer (*Gill v Eyton* (1843) 7 Beav 155; *Lewis v Davies* (1853) 17 Jur 253). The attempt in *Patch v Ward* (1865) LR 1 Eq 436 to revive the early right to production of the mortgage deed itself (2 Cases with Opinions of Counsel 53; *Anon* (1729) Mos 246; *Re White, ex p Caldecott* (1830) Mont 55 at 59) was not approved (*Carter v Hubback* (1876) 24 WR 354, CA), possibly because the mortgage deed belongs to the mortgagee (see *Sheffield v Eden* (1878) 10 ChD 291, CA). The rule applied, notwithstanding that the mortgagor was contesting the mortgage's validity (*Crisp v Platel*; *Dendy v Cross*

above) and was not excluded by a mere allegation of fraud (*Bassford v Blakesley* (1842) 6 Beav 131; *Gill v Eyton* above); but in such a case production might be ordered if the circumstances under which the mortgage was obtained, or other circumstances, made this reasonable (*Balch v Symes* (1823) Turn & R 87; *Bassford v Blakesley*; *Costa Rica Republic v Erlanger* (1874) LR 19 Eq 33 at 45). The rule applied notwithstanding that the mortgagee in his statements of case had craved leave to refer to the deeds (*Howard v Robinson* (1859) 4 Drew 522), and it extended to drafts and copies (*Bycroft v Sibel* (1852) 1 WR 96) but not necessarily to vouchers (*Gibson v Hewett* (1846) 9 Beav 293; *Freeman v Butler* (1863) 33 Beav 289); and a mortgage deed might be ordered to be produced for inspection of an indorsement on it (*Phillips v Evans* (1843) 2 Y & C Ch Cas 647). Where a trustee had mortgaged, and had then released the equity of redemption to the mortgagee who had notice of the trust, the beneficiary was entitled to production against the mortgage: *Smith v Barnes* (1865) LR 1 Eq 65.

3 *Schlenker v Moxey* (1824) 1 C & P 178.

4 *Mills v Oddy* (1834) 6 C & P 728; *Doe d Gilbert v Ross* (1840) 7 M & W 102 at 122; *Phelps v Prew* (1854) 3 E & B 430; contra *Doe d Bowdler v Owen* (1837) 8 C & P 110.

5 *Gough v Offley* (1852) 5 De G & Sm 653.

6 *Hercy v Ferrers* (1841) 4 Beav 97. As to secondary evidence generally see **CIVIL PROCEDURE** vol 11 (2009) PARAS 762-763, 878-888.

7 *Lewis v Plunket* [1937] Ch 306, [1937] 1 All ER 530.

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494. Liability of mortgagee of limited interest.

A tenant for life holds the deeds subject to liability to produce them for the inspection of remaindermen with a vested, but not with a contingent, interest; and the mortgagee from the tenant for life, if he takes the deeds, takes them subject to the same liability¹. This rule does not seem to be affected by the legal estate in fee simple being now vested in the tenant for life². If the mortgage is paramount to the settlement, the remainderman cannot as such require production³, but, as he has a right to redeem, he would have the statutory right to production⁴. Generally, the mortgagee of a partial interest in property who obtains the deeds is bound to produce them to other persons interested⁵. Thus the mortgagee of a lease of which there is no counterpart is bound to produce it at the lessor's request⁶.

1 *Noel v Ward* (1816) 1 Madd 322; *Davis v Earl of Dysart* (1855) 20 Beav 405. As to the power of mortgage of a tenant for life see PARA 168.

2 See the Settled Land Act 1925 s 38; and **SETTLEMENTS** vol 42 (Reissue) PARA 827.

3 *Chichester v Marquis of Donegall* (1870) 5 Ch App 497. See also PARA 510.

4 See PARAS 485, 491.

5 In *Lambert v Rogers* (1817) 2 Mer 489, it was held that a mortgagee of the share of a co-owner was not bound to produce the deeds to another co-owner, as a mortgagee could not be compelled to disclose his mortgagor's title; but the other co-owner's rights cannot be prejudiced by the mortgage; and now the deeds should be held by the trustees of the statutory trusts. See also PARA 156.

6 *Doe d Morris v Roe* (1836) 1 M & W 207; *Balls v Margrave* (1841) 4 Beav 119.

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(iii) Liability for Loss

495. Nature of mortgagor's remedy.

Upon redeeming, the mortgagor is entitled to a discharge and to delivery of the title deeds and writings relating to the property, including copies¹, and if they have been lost he is justified in instituting proceedings for redemption² in order that the fact of the loss may be ascertained for the satisfaction of future purchasers. In such proceedings, the mortgagee is directed to give an indemnity against the consequences of the loss of the deeds, and he is liable to pay the costs³; and the rule is the same if the mortgagor redeems in the mortgagee's foreclosure claim⁴. Where the deeds are known to be in a third person's possession, the mortgagor will be allowed to bring proceedings to recover them at the mortgagee's expense⁵. The mortgagor may also be entitled to compensation for the loss of the deeds⁶, but not until redemption⁷.

1 The mortgagee is not entitled to keep fair copies made at the mortgagor's expense, nor, it seems, copies made at his own expense: *Re Wade and Thomas* (1881) 17 ChD 348 at 352.

2 As to such proceedings see PARA 656 et seq.

3 *Lord Midleton v Eliot* (1847) 15 Sim 531; *James v Rumsey* (1879) 11 ChD 398; *Caldwell v Matthews* (1890) 62 LT 799. An inquiry as to the loss of the deeds will be directed: *Smith v Bicknell* (1805) 3 Ves & B 51n; *Stokoe v Robson* (1814) 3 Ves & B 51; *Shelmardine v Harrop* (1821) 6 Madd 39. For forms of indemnity see *Shelmardine v Harrop*; *James v Rumsey* above. The form, in case of difference, is settled in chambers; but unreasonable opposition by the mortgagor to the indemnity offered will, perhaps, make him liable for costs thereby occasioned: cf *Macartney v Graham* (1831) 2 Russ & M 353. Where the mortgage deed has been destroyed, eg by fire, the mortgage may be confirmed.

4 *Stokoe v Robson* (1815) 19 Ves 385; *Shelmardine v Harrop* (1821) 6 Madd 39. As to foreclosure see PARA 566 et seq.

5 *Hornby v Matcham* (1848) 16 Sim 325; *Brown v Sewell* (1853) 11 Hare 49.

6 *Hornby v Matcham* (1848) 16 Sim 325; *Brown v Sewell* (1853) 11 Hare 49.

7 *Gilligan and Nugent v National Bank Ltd* [1901] 2 IR 513; *Browning v Handiland Group Ltd and Bush Investments Trust Ltd (third party)* (1976) 35 P & CR 345; cf *James v Rumsey* (1879) 11 ChD 398, where compensation was refused on special grounds.

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496. Delay of redemption through loss.

Interest will cease to run at the date when the mortgagor is ready to redeem if redemption is delayed through the loss of the deeds¹. The mortgagor cannot be sued for the debt if there is a danger of his not getting back his title deeds on payment², but it is otherwise if the deeds are in fact lost³.

1 *Lord Midleton v Eliot* (1847) 15 Sim 531; *James v Rumsey* (1879) 11 ChD 398.

2 *Schoole v Sall* (1803) 1 Sch & Lef 176.

3 *Baskett v Skeel* (1863) 11 WR 1019.

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(iv) Delivery of Title Deeds on Extinguishment of Mortgage Debt

497. To whom title deeds delivered.

On being paid off, the mortgagee delivers the title deeds to the mortgagor, or, if he has notice of other incumbrancers, to the incumbrancer ranking next after himself¹, but he is not liable for delivering them to the person not having the best right to them unless he has notice of the right or claim of a person having a better right². As registration of a later mortgage as a land charge is notice to all the world³, the mortgagee would not have been safe in handing over the deeds without searching the land charges register against the mortgagor. To avoid this, it is provided that notice in this connection does not include notice by reason of registration under the Land Charges Act 1972⁴. Where the mortgagee loses all title to the mortgaged land by lapse of time, the mortgagor can recover possession of the mortgage and other title deeds⁵.

1 See *Corbett v National Provident Institution* (1900) 17 TLR 5.

2 See the Law of Property Act 1925 s 96(2).

3 See PARA 261.

4 See the Law of Property Act 1925 s 96(2) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule; Law of Property Act 1969 s 16(2), Sch 2 Pt I; Land Charges Act 1972 s 18(6)). As to the registration of puisne mortgages and general equitable charges see PARA 260.

5 *Lewis v Plunket* [1937] Ch 306, [1937] 1 All ER 530.

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(7) RIGHT OF CONSOLIDATION

(i) Nature of the Right

498. General principle.

A mortgagee who holds several distinct mortgages under the same mortgagor which are redeemable, not under the right of redemption expressly reserved by the mortgage deeds, but only by virtue of the equity of redemption arising after default in payment at the fixed day¹, may, within certain limits, and against certain persons who are entitled to redeem all or some of the mortgages, consolidate the mortgages, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all². This is an application of the maxim that he who seeks equity must do equity³. After the original day for redemption is past⁴, the

mortgagor can only redeem by the assistance of equity, and this assistance is given upon the terms that he is to pay the money due both in respect of the estate which he seeks to redeem and in respect of the other mortgaged estates⁵. Where two estates are subject to distinct mortgages, and a second mortgage is granted of both estates, the second mortgagee is not bound to redeem both the first mortgages if he wishes to redeem one⁶.

1 As to enforcement of the equity of redemption see PARA 329. The right to consolidate arises in equity after default: see PARA 499.

2 *Jennings v Jordan* (1881) 6 App Cas 698 at 700, HL, per Lord Selborne LC; and see the same case in the Court of Appeal sub nom *Mills v Jennings* (1880) 13 ChD 639 at 646, CA. See also *Griffith v Pound* (1890) 45 ChD 553 at 560. As to the statutory exclusion of consolidation see PARA 500.

3 *Chesworth v Hunt* (1880) 5 CPD 266 at 271. See also **EQUITY** vol 16(2) (Reissue) PARA 558 et seq.

4 See PARAS 329, 566.

5 *Willie v Lugg* (1761) 2 Eden 78 at 80; *Jones v Smith* (1794) 2 Ves 372 at 377; *Cummins v Fletcher* (1880) 14 ChD 699 at 708, CA; *Mills v Jennings* (1880) 13 ChD 639 at 646, CA (on appeal sub nom *Jennings v Jordan* (1881) 6 App Cas 698, HL); *Minter v Carr* [1894] 3 Ch 498 at 501, CA. For early statements of the rule see *Shuttleworth v Laycock* (1684) 1 Vern 245; *Margrave v Le Hooke* (1690) 2 Vern 207; *Pope v Onslow* (1692) 2 Vern 286; *Cator v Charlton* (1775) cited in 2 Ves at 377; *Collett v Munden* (1786) cited in 2 Ves at 377. The courts of law recognised the doctrine in proceedings where the equity of redemption incidentally fell within their jurisdiction: *Roe d Kaye v Soley* (1770) 2 Wm Bl 726; and see *Marcon v Bloxam* (1856) 11 Exch 586.

6 *Pelly v Wathen* (1849) 7 Hare 351 at 365.

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499. Right arises only after default.

As the right of consolidation is equitable, it only arises after there has been default on all the securities in respect of which it is claimed; that is, the days fixed for redemption must have passed, so that the mortgagor has lost his legal right and is bound to come into equity to redeem¹.

1 *Crickmore v Freeston* (1870) 40 LJCh 137; *Cummins v Fletcher* (1880) 14 ChD 699, CA. See also *Jones v Smith* (1794) 2 Ves 372 at 376; *Jennings v Jordan* (1881) 6 App Cas 698 at 717, HL.

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500. Statutory exclusion of consolidation.

A mortgagor¹ seeking to redeem any one mortgage² is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, solely on property other than that comprised in the mortgage which he seeks to redeem³. This applies only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them⁴. Apart from this, nothing in the Law of Property Act 1925 in reference to mortgages affects any right of consolidation or renders inoperative a stipulation in relation to

any mortgage, whenever made, reserving a right to consolidate⁵. Where it is intended to exclude the statutory rule, this is usually done by a clause expressly providing that the rule is not to apply to the security, although a clause providing for the preservation of the right of consolidation is equally effective⁶. A clause which refers to mortgages only will not give a right to consolidate a vendor's lien with a mortgage⁷. A clause excluding the statutory provision contained in the first of several mortgages of different properties effectively preserves the right of consolidation under all the mortgages, even though it is not contained in the subsequent mortgages⁸; and, similarly, a clause in a subsequent mortgage is effective as to previous mortgages⁹.

- 1 As to the meaning of 'mortgagor' see PARA 104 note 1.
- 2 As to the meaning of 'mortgage' see PARA 101 note 4.
- 3 Law of Property Act 1925 s 93(1).
- 4 Law of Property Act 1925 s 93(1).
- 5 Law of Property Act 1925 s 93(3).
- 6 *Hughes v Britannia Permanent Benefit Building Society* [1906] 2 Ch 607 at 611.
- 7 *Re Pearce* [1909] 2 Ch 492 at 495, CA. As to the vendor's lien see **LIEN** vol 68 (2008) PARA 859.
- 8 *Re Salmon, ex p Trustee* [1903] 1 KB 147.
- 9 *Griffith v Pound* (1890) 45 ChD 553.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(i) Nature of the Right/501. Registered land.

501. Registered land.

A chargee who has the right of consolidation in relation to a registered charge¹ may apply to the registrar for an entry to be made in respect of that right in the individual register in which that charge is registered². The registrar must make an entry in the individual register in such terms as he considers appropriate to give effect to such an application³.

- 1 As to the meaning of 'registered charge' see PARA 159 note 7.
- 2 Land Registration Rules 2003, SI 2003/1417, r 110(1). The application must be made in Form CC: r 110(2). As to registered land generally see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 801 et seq.
- 3 Land Registration Rules 2003, SI 2003/1417, r 110(3).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(ii) When the Right Exists/502. Where mortgages made by same mortgagor.

(ii) When the Right Exists

502. Where mortgages made by same mortgagor.

The right of consolidation¹ only exists where the mortgages have been made originally by the same mortgagor², and can be asserted only to the extent of the mortgagor's own interest in the properties³, although it is possible that the right exists where one mortgage is made by the mortgagor and another by persons claiming by devolution from him on his death⁴. The right does not exist where one mortgage is by a sole mortgagor and the other mortgage is by the same mortgagor jointly with another⁵. Hence a security given by a partner for his private debt cannot be consolidated with a security given by himself and the other partners for a partnership debt⁶, and a mortgage by a co-owner of his share of the estate cannot be consolidated with a mortgage of the entirety⁷. As, for the purpose of ascertaining the right of consolidation, the mortgagee is not entitled to look into any transactions between the mortgagor and third persons, a mortgage by a trustee cannot be consolidated with a mortgage by the beneficiary⁸, nor can a mortgage by a surety be consolidated with a mortgage given by the principal debtor for another debt⁹.

1 As to the right of consolidation see PARA 498.

2 *Sharp v Rickards* [1909] 1 Ch 109.

3 See *Lord Kensington v Bouverie* (1854) 19 Beav 39; on appeal (1859) 7 HL Cas 557.

4 See *White v Hillacre* (1839) 3 Y & C Ex 597. As to the exercise of the right against an assignee of one of the equities of redemption see PARA 508.

5 *Jones v Smith* (1794) 2 Ves 372 at 376. See also *Marcon v Bloxam* (1856) 11 Exch 586 at 600.

6 *Cummins v Fletcher* (1880) 14 ChD 699 at 710, CA, per James LJ (disagreeing with *Beevor v Luck*, *Beevor v Lawson* (1867) LR 4 Eq 537 at 543). As to mortgages by partners see PARA 162 et seq.

7 *Thornycroft v Crockett* (1848) 2 HL Cas 239 at 245-255.

8 *Re Raggett, ex p Williams* (1880) 16 ChD 117 at 119, CA, per James LJ; *Sharp v Rickards* [1909] 1 Ch 109.

9 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1144.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(ii) When the Right Exists/503. Consolidation where securities are of different natures.

503. Consolidation where securities are of different natures.

For the purposes of the right to consolidate¹, it is immaterial that the securities comprise properties of different natures, or that one or both are equitable mortgages; hence a mortgage of real estate can be consolidated with a mortgage of personal estate², and a legal mortgage can be consolidated with an equitable mortgage³, and an equitable mortgage with another equitable mortgage⁴. The right to consolidate does not depend, as the right to tack formerly did⁵, upon the possession of the legal estate⁶.

1 As to the right to consolidate see PARA 498.

2 *Tassell v Smith* (1858) 2 De G & J 713. See also *Watts v Symes* (1851) 1 De GM & G 240 (revsg the judgment of Shadwell V-C (1849) 16 Sim 640 at 647); *Spalding v Thompson* (1858) 26 Beav 637; *Cracknall v Janson* (1879) 11 ChD 1, CA. As to bills of sale see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1655, 1669.

3 See *Watts v Symes* (1851) 1 De GM & G 240.

4 *Tweeddale v Tweeddale* (1857) 23 Beav 341.

5 See PARA 264 note 1.

6 *Neve v Pennell, Hunt v Neve* (1863) 2 Hem & M 170 at 183. See, however, dicta to the contrary in *Jones v Smith* (1794) 2 Ves 372 at 376; *White v Hillacre* (1839) 3 Y & C Ex 597 at 609.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(ii) When the Right Exists/504. Consolidation where securities originally in favour of different mortgagees.

504. Consolidation where securities originally in favour of different mortgagees.

For the purposes of the right of consolidation it is not necessary that the securities should have been created originally in favour of the same mortgagee¹. The right exists where mortgages given to different mortgagees subsequently become vested in the same person². There must be, however, an actual union of the securities in one person. A mortgage to one mortgagee will not be treated as consolidated with a mortgage to the same person and another on a joint account³.

1 As to the right of consolidation see PARA 498.

2 *Tweeddale v Tweeddale* (1857) 23 Beav 341; *Vint v Padget* (1858) 2 De G & J 611; *Selby v Pomfret* (1861) 3 De GF & J 595; *Jennings v Jordan* (1881) 6 App Cas 698 at 700, HL; *Pledge v White* [1896] AC 187, HL. The contrary decision in *Fosbrooke v Walker* (1832) 2 LJCh 161 is clearly wrong. As to *Selby v Pomfret* above see *Cummins v Fletcher* (1880) 14 ChD 699 at 709, CA, per James LJ.

3 *Riley v Hall* (1898) 79 LT 244.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(ii) When the Right Exists/505. Securities must be in existence at time of consolidation.

505. Securities must be in existence at time of consolidation.

Both the securities which the mortgagee claims to consolidate must be in existence at the time when the claim is made¹. There is no right to apply a surplus on an existing mortgage to make good a debt secured by a mortgage which has ceased to exist by reason of the determination of its subject matter, such as a life interest² or a lease³. In such a case, the debt formerly secured by the mortgage has ceased to be a secured debt, and a mortgagee who has in his hands a surplus from a realised security may not, as against other creditors, apply it in payment of a debt which has become a simple contract debt⁴. Where a mortgagee has been redeemed as to one mortgage by an incumbrancer against whom he could not consolidate, he loses any right to consolidation he had against subsequent incumbrancers⁵.

Notwithstanding this rule, however, a mortgagee who has sold one of his securities and paid off the debt primarily charged on that security is not thereby debarred from exercising the right of consolidation, and can apply the balance of the proceeds in payment of the debt owing on his other security⁶, and where a mortgagee has given notice to pay off one mortgage with a view to acquiring the right to exercise his power of sale, he may nevertheless consolidate and may refuse a tender of the money due under that mortgage alone⁷.

- 1 As to the right of consolidation see PARA 498.
- 2 *Re Gregson, Christison v Bolam* (1887) 36 ChD 223.
- 3 *Re Raggett, ex p Williams* (1880) 16 ChD 117, CA. Similarly, a subsequent debt could not be tacked to a mortgage which had been paid off: *Brecon Corpn v Seymour* (1859) 26 Beav 548. Tacking by virtue of a legal estate has now been abolished: see PARA 264.
- 4 *Talbot v Frere* (1878) 9 ChD 568; *Re Gregson, Christison v Bolam* (1887) 36 ChD 223 (disagreeing with *Spalding v Thompson* (1858) 26 Beav 637; *Re Haselfoot's Estate, Chauntler's Claim* (1872) LR 13 Eq 327; *Re General Provident Assurance Co, ex p National Bank* (1872) LR 14 Eq 507).
- 5 *Jennings v Jordan* (1881) 6 App Cas 698 at 707, HL. As to the persons against whom the mortgagee may consolidate see PARAS 506-511.
- 6 *Selby v Pomfret* (1861) 1 John & H 336; *Cracknall v Janson* (1879) 11 ChD 1, CA.
- 7 *Griffith v Pound* (1890) 45 ChD 553.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(iii) Against whom the Mortgagee may Consolidate/506. Consolidation against mortgagor.

(iii) Against whom the Mortgagee may Consolidate

506. Consolidation against mortgagor.

The right of consolidation¹ is exercisable primarily against the mortgagor, and may be asserted in any proceeding in which the right of redemption comes in question; for this purpose foreclosure and redemption claims are on the same footing².

- 1 As to the right of consolidation see PARA 498.
- 2 *Watts v Symes* (1851) 1 De GM & G 240 at 246; *Selby v Pomfret* (1861) 1 John & H 336 at 338 (affd on appeal 3 De G F & J 596 at 598); *Tribourg v Lord Pomfret* (1773) cited in Amb at 733; *Re Loosemore, ex p Berridge* (1843) 3 Mont D & De G 464. As to terms and incidents of redemption see PARAS 324-325. As to foreclosure see PARA 566 et seq. Formerly the view was held that consolidation was confined to redemption suits: *Holmes v Turner* (1843) 7 Hare 367n; *Smeathman v Bray (or Gray)* (1851) 15 Jur 1051. As to the amount of arrears of interest to which a mortgagee is entitled in a foreclosure claim see **LIMITATION PERIODS** vol 68 (2008) PARA 1128; and to the amount of arrears of interest to which a mortgagee is entitled in a redemption claim see **LIMITATION PERIODS** vol 68 (2008) PARA 1137.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(iii) Against whom the Mortgagee may Consolidate/507. Consolidation against mortgagor's successors in title.

507. Consolidation against mortgagor's successors in title.

So long as the equities of redemption are not severed, the right of consolidation¹ may be asserted against successors in title to the mortgagor². For this purpose, it is immaterial whether the mortgages were originally made to the same mortgagee, or whether they have merely become united in the same person³; and in the latter case the right may be asserted even though the union of the mortgages has taken place after the change in the title to the equities of redemption. Thus the right of consolidation exists where the mortgages become united after

a mortgagor's bankruptcy⁴ or after the sale or further mortgage of both the estates to the same person⁵, provided that the sale or further mortgage of the two estates is effected as one transaction⁶. The right may be asserted even though the union of the mortgages has taken place with notice of a change in the title to the equity of redemption⁷. The mortgages must, however, both be prior to the change of title⁸.

1 As to the right of consolidation see PARA 498.

2 *Willie v Lugg* (1761) 2 Eden 78; *Jones v Smith* (1794) 2 Ves 372 at 376. Thus it might be asserted against the heir, and may now be asserted against the mortgagor's personal representatives (*Margrave v Le Hooke* (1690) 2 Vern 207), or against his trustee in bankruptcy (*Pope v Onslow* (1692) 2 Vern 286; *Re Breeds, ex p Alsager* (1841) 2 Mont D & De G 328; *Cracknall v Janson* (1879) 11 ChD 1, CA). As to consolidation against sureties see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1144.

3 See PARA 504.

4 *Selby v Pomfret* (1861) 3 De GF & J 595; *Re Salmon, ex p Trustee* [1903] 1 KB 147.

5 *Tweedale v Tweedale* (1857) 23 Beav 341; *Vint v Padget* (1858) 2 De G & J 611; *Pledge v White* [1896] AC 187, HL. See also *Bovey v Skipwich* (1671) 1 Cas in Ch 201.

6 *Pledge v White* [1896] AC 187, HL.

7 *Vint v Padget* (1858) 2 De G & J 611.

8 See *Squire v Pardoe* (1891) 40 WR 100, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(iii) Against whom the Mortgagee may Consolidate/508. Effect of severance of equities of redemption.

508. Effect of severance of equities of redemption.

Where the equities of redemption have been severed, whether by sale or further mortgage, or by settlement, voluntary or otherwise¹, the existence of the right of consolidation² against the assignee of one equity of redemption depends on whether it had attached before the severance. This may be either because both mortgages were prior to the severance and were made to the same mortgagee³, or because, although made to different mortgagees, they had become vested in the same person before the severance⁴. In these cases, the assignee of one mortgaged property, even though he has given valuable consideration⁵, and without notice of the mortgage on the other property⁶, takes subject to the existing right of consolidation, and must submit to give effect to it⁷. Hence he cannot redeem his own property without paying off the mortgage on the other property also⁸, but, if he does this, he is entitled to have both properties conveyed to him⁹.

1 See *Re Walhampton Estate* (1884) 26 ChD 391, where it was held that the avoidance by a mortgage of a prior voluntary settlement under 27 Eliz 1 c 4 (1584-5) did not let in the right to consolidate that mortgage with a subsequent mortgage of other property. That Act, which was amended by the Voluntary Conveyances Act 1893, is now reproduced in the Law of Property Act 1925 s 173: see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 868 et seq.

2 As to the right of consolidation see PARA 498.

3 *Tribourg v Lord Pomfret* (1773) cited in Amb 733; *Re --, ex p Carter* (1773) Amb 733; *Ireson v Denn* (1796) 2 Cox Eq Cas 425. See also *Titley v Davies* (1743) 2 Y & C Ch Cas 399n; *Jones v Smith* (1794) 2 Ves 372 at 376-377.

4 *Jennings v Jordan* (1881) 6 App Cas 698, HL; *Hughes v Britannia Permanent Benefit Building Society* [1906] 2 Ch 607.

5 *Re--*, *ex p Carter* (1773) Amb 733 (purchase on sale); *Tribourg v Lord Pomfret* (1773) cited in Amb 733 (subsequent mortgage).

6 *Ireson v Denn* (1796) 2 Cox Eq Cas 425.

7 See *Neve v Pennell*, *Hunt v Neve* (1863) 2 Hem & M 170 at 183.

8 *Jennings v Jordan* (1881) 6 App Cas 698 at 701, HL.

9 *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460 at 466, CA.

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509. Right to consolidate must have attached before severance.

Where, on the other hand¹, the right of consolidation² has not attached at the date of severance, it does not attach subsequently. Thus the assignee of an equity of redemption does not become subject to consolidation by reason of a subsequent mortgage by the assignor of different property³, or by reason of the subsequent union of mortgages which were created before the assignment in favour of different mortgagees⁴. An express right of consolidation contained in the first mortgage does not enable the mortgagee to consolidate it with subsequent mortgages of other properties as against a second mortgagee of the first property, such subsequent mortgages being made after the date of the second mortgage of the first property and with notice of it⁵.

1 As to the alternative position see PARA 508.

2 As to the right of consolidation see PARA 498.

3 *Jennings v Jordan* (1881) 6 App Cas 698 at 702, HL, overruling *Tassell v Smith* (1858) 2 De G & J 713. The principle stated in the text applies even more strongly where the mortgagee of the second estate takes a transfer of the mortgage of the first estate with notice of the assignment of the equity of redemption of that estate: *Baker v Gray* (1875) 1 ChD 491. Where there is a mortgage of leasehold property, A, first to X, and secondly to Y; subsequently a mortgage of property, B, to X; and then substituted mortgages to X and Y successively of a renewed lease of A, the substituted mortgages to X and Y are not treated as new mortgages so as to give to X a right of consolidation against Y, especially if the priority of X for his first mortgage, and for a further advance to enable the new lease to be taken, is expressly reserved: *Bird v Wenn* (1886) 33 ChD 215.

4 *White v Hillarce* (1839) 3 Y & C Ex 597 at 609; *Harter v Colman* (1882) 19 ChD 630; *Minter v Carr* [1894] 3 Ch 498, CA. See, contra, *Beevor v Luck*, *Beevor v Lawson* (1867) LR 4 Eq 537, where it was considered that, if at the time of assignment of one equity of redemption a mortgage by the same mortgagor was existing on another estate, the assignee took subject to the possibility of the two mortgages uniting, and in that case would be subject to consolidation; but this was questioned in *Jennings v Jordan* (1881) 6 App Cas 698 at 701, 718, HL, and must be taken to be overruled (*Pledge v White* [1896] AC 187 at 195, HL).

5 *Hughes v Britannia Permanent Benefit Building Society* [1906] 2 Ch 607. To allow such a claim would be contrary to the principle of *Hopkinson v Rolt* (1861) 9 HL Cas 514: see PARA 265 note 4. In *Andrews v City Permanent Benefit Building Society* (1881) 44 LT 641, the mortgagee was allowed to consolidate against a second mortgagee of one property taking with notice of an express covenant for consolidation.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(iii) Against whom the Mortgagee may Consolidate/510. Severance by devise similar to those previously stated.

510. Severance by devise similar to those previously stated.

Similar considerations apply where the equities of redemption are severed by devise to different devisees¹. If the mortgages are not united until after the testator's death, the right of consolidation does not arise².

¹ As to the effect of severance of the equities of redemption on the right to consolidate see PARAS 508-509. As to the right of consolidation see PARA 498.

² *White v Hillacre* (1839) 3 Y & C Ex 597.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(iii) Against whom the Mortgagee may Consolidate/511. Effect of intervening incumbrancers' right to marshal.

511. Effect of intervening incumbrancers' right to marshal.

Where the mortgagee of two properties is entitled to a further charge on one, and there are intervening incumbrances on that property, then, after his first mortgage has been paid off out of that property exclusively the mortgagee may not exercise his right of consolidation¹ so as to throw his further charge on the other property and defeat the intervening incumbrancers' right to marshal².

¹ As to the right of consolidation see PARA 498.

² *Ford v Tynte* (1872) 41 LJCh 758. As to marshalling see PARAS 632-635.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(iv) Who may Exercise the Right/512. Person in whom mortgages are united.

(iv) Who may Exercise the Right

512. Person in whom mortgages are united.

Where mortgages over distinct properties have been granted by the same mortgagor, the right of consolidation¹ may be exercised by the person in whom the mortgages are united, whether he is the original mortgagee, or whether the mortgages or one of them have come to him by assignment or devolution². It is immaterial whether he holds on his own account or as trustee³. Although he may consolidate notwithstanding that such union has taken place after the mortgagor's bankruptcy⁴, he cannot, to the prejudice of other creditors, consolidate, with a prior security held by him, a security for an advance taken after notice of insolvency⁵.

An incumbrancer on the equity of redemption in one of two mortgaged estates who pays off a mortgage on the other estate becomes an equitable assignee of that mortgage, and is entitled

to consolidate what he so pays with his own debt⁶. Moreover, if a first mortgagee has two debts, secured on separate properties, and the second mortgagee of one property sells that property and, in pursuance of the first mortgagee's claim to consolidate, pays off both the first mortgagee's debts out of the proceeds, the second mortgagee is entitled to consolidate the first mortgagee's debt secured on the unsold property with his own debt and to recover it against a third property included in his security⁷.

1 As to the right of consolidation see PARA 498.

2 *Jennings v Jordan* (1881) 6 App Cas 698 at 700, HL.

3 *Tassell v Smith* (1858) 2 De G & J 713, overruled on another point (see PARA 509 note 3).

4 See PARA 524.

5 *Re Softley, ex p Hodgkin* (1875) LR 20 Eq 746 at 757 per Bacon CJ.

6 *Titely v Davies* (1743) 2 Y & C Ch Cas 399n. As to the subrogated rights of a person paying off a mortgage debt see PARA 384.

7 *Cracknall v Janson* (1879) 11 ChD 1, CA. In such a case the payment of the debt owed to the first mortgagee and secured on the unsold property is made out of money which, if the first mortgagee had not claimed the right to consolidate, would have belonged to the second mortgagee; the payment is therefore treated as a payment by the second mortgagee out of his own money and the second mortgagee becomes an equitable transferee of the mortgage on the unsold property: *Cracknall v Janson* above at 17-18.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/8. RIGHTS AND LIABILITIES OF THE MORTGAGEE/(7) RIGHT OF CONSOLIDATION/(iv) Who may Exercise the Right/513. Assignee of right takes subject to equities.

513. Assignee of right takes subject to equities.

As the right of consolidation is an equitable right¹, the ordinary incidents of equitable rights attach to it. Consequently, the mortgagee's assignee stands in no better position than his assignor; and if, by arrangement between the assignor and a subsequent incumbrancer, the assignor has waived his right of consolidation, the right is not exercisable by the assignee².

1 As to the right of consolidation see PARA 498.

2 *Bird v Wenn* (1886) 33 ChD 215.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(1) GENERAL RIGHT TO PURSUE REMEDIES/(i) Right to Pursue Remedies Concurrently/514. Right to exercise remedies concurrently.

9. REMEDIES OF MORTGAGEES

(1) GENERAL RIGHT TO PURSUE REMEDIES

(i) Right to Pursue Remedies Concurrently

514. Right to exercise remedies concurrently.

Once the mortgagor has made default¹ in payment of the mortgage debt, the mortgagee is entitled to pursue any or all of his remedies, subject, as regards the powers of sale and appointing a receiver, to the restrictions imposed by agreement or by statute, according as the powers are express or statutory². Accordingly, the mortgagee can at the same time sue for payment on the covenant to pay principal and interest, for possession of the mortgaged estate, and for foreclosure³, and can combine these in the same claim⁴; and until judgment nisi has been obtained in his foreclosure claim, he can exercise his power of sale⁵. The mortgagee does, however, owe a general duty to exercise his powers in good faith for the purpose of obtaining repayment⁶.

If the mortgagee realises part of the debt by his claim on the covenant, or by sale of part of the property, he must give credit in the foreclosure claim for the amount realised, and if, after foreclosure, he proceeds on the covenant, he reopens the foreclosure⁷. The mortgagee may not sue on the covenant if he has sold the property to a third party, since the foreclosure cannot be reopened⁸. A realisation of the whole debt gives the mortgagor an immediate right to reconveyance of the mortgaged property remaining unsold⁹. It follows that where there are collateral securities the mortgagee should realise these first, and then foreclose in respect of the balance of his debt¹⁰.

1 Where a day for payment is fixed by the mortgage deed, the default occurs when this day has elapsed without payment (see PARAS 107, 329); where no day is fixed, there is default when the money is not paid on demand (see PARA 538).

2 As to the mortgagee's powers of sale see PARA 440 et seq. As to the appointment of receivers see PARA 475 et seq.

3 *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL. See also *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472, [1991] 4 All ER 989, PC. As to foreclosure see PARA 566 et seq.

4 *Dymond v Croft* (1876) 3 ChD 512; *Greenough v Littler* (1880) 15 ChD 93; *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA. As to joining a claim for possession with the claim for foreclosure see PARA 587.

5 After judgment for foreclosure nisi and before foreclosure absolute (see PARA 594 et seq), a mortgagee cannot sell without the permission of the court, but the power of sale is merely suspended and not extinguished so that a purchaser for value without notice may get a good title: see *Stevens v Theatres Ltd* [1903] 1 Ch 857. See also PARA 614.

6 See PARA 392.

7 As to opening foreclosure see PARA 611 et seq.

8 *Lloyds and Scottish Trust Ltd v Britten* (1982) 44 P & CR 249, 79 LS Gaz 1291 (applying *Kinnaird v Trollope* (1888) 39 ChD 636).

9 *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472, [1991] 4 All ER 989, PC; *Lockhart v Hardy* (1846) 9 Beav 349 at 355. See also PARA 642 et seq.

10 *Dyson v Morris* (1842) 1 Hare 413 at 423.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(1) GENERAL RIGHT TO PURSUE REMEDIES/(ii) Loss of Right to Sue/515. Loss of right to sue by running of time.

(ii) Loss of Right to Sue

515. Loss of right to sue by running of time.

A claim (other than a foreclosure claim in respect of mortgaged land) to recover the principal money secured by a mortgage or other charge on property, whether real or personal, which existed when the cause of action accrued¹, may not be brought after 12 years from the date when the right to receive the money accrued². The statutory provisions relating to the limitation of actions to recover land apply to a foreclosure claim in respect of land³ or a claim by a mortgagee of land for possession⁴; but not to a claim for possession by an equitable chargee⁵. The period of limitation applicable is normally 12 years from the date when the right of action accrued, and at the end of the period the mortgagee's title is extinguished⁶. A foreclosure claim in respect of mortgaged personal property may not be brought more than 12 years from the date when the right to foreclose accrued⁷.

In general, not more than six years' arrears of interest can be recovered by a mortgagee⁸, but this restriction does not apply to a foreclosure claim in respect of land⁹. Where a mortgagee sells the mortgaged property or brings proceedings to enforce his security he is entitled to retain all principal and arrears of interest, whether or not statute barred, before accounting to the mortgagor for the surplus¹⁰. A mortgagor is not entitled to redeem a mortgage unless he tenders the full amount of the principal and interest due, whether or not any part of it is statute barred¹¹. If a mortgagee sues on the covenant and obtains a judgment for the debt, not more than six years' arrears of interest in respect of the judgment debt can be recovered by bringing proceedings or by execution¹².

These periods of limitation are subject to certain extensions or postponements in the case of disability, acknowledgment¹³, part payment¹⁴, fraud or mistake¹⁵.

No statutory limitation period applies to the execution of a judgment¹⁶ or to a charging order¹⁷.

1 The cause of action accrues when there is a breach of an express or implied covenant to repay the advance, regardless of whether there was an antecedent loan contract, and regardless of whether there is an express covenant to pay the shortfall following sale. In the case of an instalment mortgage the cause of action normally accrues on failure to pay an instalment, whether or not there is an express covenant to repay the capital advance: see *Bristol & West plc v Bartlett* [2002] EWCA Civ 1181, [2002] 4 All ER 544, [2003] 1 WLR 284; *Scottish Equitable plc v Thompson* [2003] EWCA Civ 211, [2003] HLR 690; *West Bromwich Building Society v Wilkinson* [2005] UKHL 44, [2005] 4 All ER 97, [2005] 1 WLR 2303.

2 See the Limitation Act 1980 s 20(1); and **LIMITATION PERIODS** vol 68 (2008) PARA 1105. This provision applies whether or not the mortgagee has exercised his power of sale before proceedings are commenced and whether or not there is a covenant in the mortgage to pay any shortfall following sale: see *Bristol & West plc v Bartlett* [2002] EWCA Civ 1181, [2002] 4 All ER 544, [2003] 1 WLR 284.

3 See the Limitation Act 1980 s 20(4); and **LIMITATION PERIODS** vol 68 (2008) PARA 1105.

4 See **LIMITATION PERIODS** vol 68 (2008) PARA 1124 et seq.

5 *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156, [2009] 2 All ER (Comm) 164, [2009] 1 P & CR 345

6 See the Limitation Act 1980 ss 15, 17; and **LIMITATION PERIODS** vol 68 (2008) PARAS 1025, 1095. The cause of action arises on the grant of the mortgage where the mortgagor remains in possession without express permission: see *Ashe v National Westminster Bank plc* [2008] EWCA Civ 55, [2008] 1 WLR 710, [2008] 2 P & CR 183.

7 See the Limitation Act 1980 s 20(2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1124.

8 See the Limitation Act 1980 s 20(5); and **LIMITATION PERIODS** vol 68 (2008) PARA 1111. As to the rights of mortgagees of future interests or life insurance policies see s 20(7); and **LIMITATION PERIODS** vol 68 (2008) PARA 1117.

9 See the Limitation Act 1980 s 20(4); and **LIMITATION PERIODS** vol 68 (2008) PARA 1104.

10 *Edmunds v Waugh* (1866) LR 1 Eq 418; *Re Marshfield, Marshfield v Hutchings* (1887) 34 ChD 721; *Re Lloyd, Lloyd v Lloyd* [1903] 1 Ch 385, CA; *Holmes v Cowcher* [1970] 1 All ER 1224, [1970] 1 WLR 834; *Ezekiel v Orakpo* [1997] 1 WLR 340, CA.

11 *Dingle v Coppen* [1899] 1 Ch 726.

12 See the Limitation Act 1980 s 24(2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1010. See also *Lowsley v Forbes* [1999] 1 AC 329, [1998] 3 All ER 897, HL.

13 See *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] 4 All ER 705, [2006] 2 All ER (Comm) 951; and **LIMITATION PERIODS** vol 68 (2008) PARAS 1183-1184.

14 See *UCB Corporate Services Ltd v Kohli* [2004] EWHC 1126 (Ch), [2004] 2 All ER (Comm) 422.

15 See **LIMITATION PERIODS** vol 68 (2008) PARA 1168 et seq.

16 See *National Westminster Bank plc v Powney* [1991] Ch 339, [1990] 2 All ER 416, CA; and **LIMITATION PERIODS** vol 68 (2008) PARA 915 et seq.

17 *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156, [2009] 2 All ER (Comm) 164, [2009] 1 P & CR 345. As to charging orders see PARA 242.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(1) GENERAL RIGHT TO PURSUE REMEDIES/(ii) Loss of Right to Sue/516. Loss of right to sue by cause of action estoppel.

516. Loss of right to sue by cause of action estoppel.

It may be an abuse of process for a party in subsequent proceedings to raise a ground of claim or defence which could have been but was not raised in earlier proceedings¹. Therefore, a mortgagee who obtains judgment for possession and for the sums expressed to be due under the mortgage cannot bring a subsequent claim for sums due under a guarantee which were also secured by the mortgage². A mortgagee is not, however, necessarily required to enforce all his rights in one action: if he brings a claim for possession or payment alone, or if he obtains an unopposed order for possession alone in proceedings for possession and payment, he is not estopped from claiming the other remedy in a subsequent proceeding³.

1 See *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481. HL; *Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1991] 3 All ER 41, HL; and see also **ESTOPPEL** vol 16(2) (Reissue) PARAS 953, 980 et seq.

2 *Lloyds Bank v Hawkins* [1998] Lloyd's Rep Bank 379, [1998] 47 EG 137, CA.

3 See *UCB Bank plc v Chandler* (1999) 79 P & CR 270, CA; *Securum Finance Ltd v Ashton* [2001] Ch 291, [2000] 3 WLR 1400, CA; and **ESTOPPEL** vol 16(2) (Reissue) PARA 984.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(1) GENERAL RIGHT TO PURSUE REMEDIES/(iii) Effect of Insolvency of Companies and Partnerships/517. Effect of mortgagor in administration.

(iii) Effect of Insolvency of Companies and Partnerships

517. Effect of mortgagor in administration.

While a company is in administration¹ a mortgagee is not entitled to take any steps to enforce any security over the company's property except with the consent of the administrator or the permission of the court². An administrator may also dispose of or take action relating to property which is subject to a floating charge as if the property were not subject to the charge³. In the case of any other type of security, the administrator may apply to the court for an order for disposal of property subject to the security as if it were not so subject, although any such order is subject to the condition that there be applied towards discharging the sums secured by the security: (1) the net proceeds of the disposal; (2) any additional sum required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value⁴. Similar provisions apply in respect of a partnership which is in administration⁵.

1 It is subject to an administration order pursuant to the Insolvency Act 1986 s 8, Sch B1: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145 et seq.

2 Insolvency Act 1986 Sch B1 para 43(2) (Sch B1 added by the Enterprise Act 2002 s 248(2)). The provisions of the Insolvency Act 1986 Sch B1 apply to any administration commencing after 15 September 2003 apart from an administration operated under a special administration regime: see the Enterprise Act 2002 ss 248, 249; the Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003, SI 2003/2093; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145. Similar, but not identical, provisions have effect in relation to administrations commencing before 15 September 2003 and administrations operated under special administration regimes: see the Insolvency Act 1986 s 11(3)(c) (saved for these purposes, and modified in its application to special administration regimes); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 157.

3 See the Insolvency Act 1986 Sch B1 para 70 (as added: see note 2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 357. For the application of these provisions see note 2. As to the appointment of an administrator by the holder of a floating charge see Sch B1 paras 2(b), 14; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 228-235. Similar, but not identical, provision has effect in relation to administrations commencing before 15 September 2003 and administrations operated under special administration regimes: see s 15(1), (3), (4); note 2; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 164.

4 See the Insolvency Act 1986 Sch B1 para 71 (as added: see note 2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 358. For the application of these provisions see note 2. For similar provisions in relation to hire-purchase property see Sch B1 para 72; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 359. Similar, but not identical, provision has effect in relation to administrations commencing before 15 September 2003 and administrations operated under special administration regimes: see s 15(2), (5); note 2; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 164.

5 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 6; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1192 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(1) GENERAL RIGHT TO PURSUE REMEDIES/(iii) Effect of Insolvency of Companies and Partnerships/518. Effect of voluntary arrangement.

518. Effect of voluntary arrangement.

A company may enter a voluntary arrangement with its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs¹. The proposal must state how it is proposed to deal with creditors who are, or claim to be, secured². The meeting of the company and its creditors summoned to consider the proposal may not approve any proposal or modification which affects the right of a secured creditor of the company to enforce his security, except with his concurrence³. Similar provisions have effect in relation to insolvent partnerships⁴.

1 See the Insolvency Act 1986 Pt I (ss 1-7B); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 71 et seq. As to the difference between a composition in satisfaction of debts and a scheme of arrangement see *March Estates plc v Gunmark Ltd* [1996] 2 BCLC 1 at 5, [1996] 2 EGLR 38 at 39 per Lightman J.

2 See the Insolvency Rules 1986, SI 1986/1925, r 1.3(2)(c)(i); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 109. As to the meanings of 'security' and 'secured creditor' for these purposes see the Insolvency Act 1986 s 248; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 109. See also *March Estates plc v Gunmark Ltd* [1996] 2 BCLC 1, [1996] 2 EGLR 38 (right to re-entry and forfeit lease renders the lessor a secured creditor for the purposes of the Insolvency Act 1986 s 4(3)).

3 See the Insolvency Act 1986 s 4(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 123.

4 See the Insolvent Partnerships Order 1994, SI 1994/2421, art 4; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1169 et seq.

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519. Effect of moratorium.

Where company directors or the members of an insolvent partnership intend to make a proposal for a voluntary arrangement, they may take steps to obtain a moratorium for the company or partnership¹, and during the period for which the moratorium is in force² no steps may be taken to enforce any security over company or partnership property³ and no proceedings, execution or other legal process may be commenced or continued against the company or partnership or its property except with the leave of the court and subject to such terms as the court may impose⁴. A company or partnership in respect of which a moratorium is in force may dispose of property which is subject to a security if either the holder of the security consents or the court gives leave⁵; in relation to a charge other than a floating charge, it is a condition of any such consent or leave that the net proceeds of the disposal and, where those proceeds are less than such amount as may be agreed or determined by the court to represent market value, such sums as may be required to make good any deficiency, be applied towards discharging the sums secured by the security⁶.

1 See the Insolvency Act 1986 s 1A(1); the Insolvent Partnerships Order 1994, SI 1994/2421, art 4, Sch 1 Pt I para 1A(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 78; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1172. Not every type of company or partnership is eligible for a moratorium. As to eligibility of companies see the Insolvency Act 1986 Sch A1 paras 2-4, 4A-4K, 5; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 73-74. As to eligibility of insolvent partnerships see Sch A1 paras 2-4; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1173.

2 A moratorium comes into force when the directors or partners (as the case may be) file the required documents with the court: see the Insolvency Act 1986 Sch A1 para 8(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 78; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1172. Provision is also made for the duration and extension of moratoriums: see Sch A1 paras 8-11, 32; the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 1 Pt II; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 78-82; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1172.

3 See the Insolvency Act 1986 Sch A1 para 12(1)(g); the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 1 Pt II; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 88; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1174.

4 See the Insolvency Act 1986 Sch A1 para 12(1)(h); the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 1 Pt II; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 88; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1174.

5 See the Insolvency Act 1986 Sch A1 para 20(1)(a), (2); the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 1 Pt II; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 91; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1175.

6 See the Insolvency Act 1986 Sch A1 para 20(6); the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 1 Pt II; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 91; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1175. Where such a condition relates to two or more securities, it must require such proceeds and sums to be applied towards discharging the sums secured by those securities in the order of their priorities: see the Insolvency Act 1986 Sch A1 para 20(7); the Insolvent Partnerships Order 1994, SI 1994/2421, Sch 1 Pt II; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 91; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1175.

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520. Effect of mortgagor in liquidation.

A mortgagee is entitled to enforce his security notwithstanding the liquidation of the mortgagor¹. However, on the making of a winding-up order or the appointment of a provisional liquidator, no action or proceeding is to be proceeded with or commenced against a company or its property except by leave of the court and subject to such terms as the court may impose². Leave will normally be granted to a secured creditor seeking to enforce his security³. If a claim or proceeding is pending against a company after the presentation of a winding-up petition but before a winding-up order has been made, an application can be made by the company or any creditor or contributory for a stay of the proceedings⁴.

If a mortgagee realises his security, he may prove for the balance of his debt, after deducting the amount realised⁵. If he voluntarily surrenders his security for the general benefit of creditors, he may prove for his whole debt, as if it were unsecured⁶. A mortgagee may, with the agreement of the liquidator or the leave of the court, at any time alter the value which he has, in his proof of debt, put upon his security⁷. However, if a secured creditor (1) being the petitioner, has in the petition put a value on his security; or (2) has voted in respect of the unsecured balance of his debt, he may re-value his security only with leave of the court⁸.

If a mortgagee omits to disclose his security in his proof of debt, he must surrender his security for the general benefit of creditors, unless the court, on application by him, relieves him on the ground that the omission was inadvertent or the result of honest mistake⁹. If the court grants that relief, it may require or allow the mortgagee's proof of debt to be amended, on such terms as may be just¹⁰.

1 *Re David Lloyd & Co, Lloyd v David Lloyd & Co* (1877) 6 ChD 339, CA.

2 See the Insolvency Act 1986 s 130(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 490, 491; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 893 et seq. As to applications to the court see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 439; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1055 et seq. The position where proceedings are started without leave after a winding-up order has been made was considered in *Re National Employers Mutual General Insurance Association Ltd (in liquidation)* [1995] 1 BCLC 232, [1995] BCC 774, where it was held that retrospective leave could not be granted. This approach was not followed in *Re Saunders (a bankrupt)* [1997] Ch 60, [1997] 3 All ER 992 (a personal insolvency case concerning the application of the Insolvency Act 1986 s 285(3): see PARA 525).

3 *Re Joshua Stubbs Ltd, Barney v Joshua Stubbs Ltd* [1891] 1 Ch 187; *Re David Lloyd & Co, Lloyd v David Lloyd & Co* (1877) 6 ChD 339, CA.

4 See the Insolvency Act 1986 s 126(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 887. If the claim or proceeding is pending in the High Court or the Court of Appeal, the application must be made in that court; otherwise the application must be made to the court having jurisdiction to wind up the company: see s 126(1)(a), (b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 887. See also note 2.

5 See the Insolvency Rules 1986, SI 1986/1925, r 4.88(1).

6 See the Insolvency Rules 1986, SI 1986/1925, r 4.88(2). Inadvertent proof for the whole debt is not to be treated as an express surrender: see *C & W Berry Ltd v Armstrong-Moakes* [2007] EWHC 2101 (QB), [2008] 1 P & CR D2, [2007] All ER (D) 82 (Sep).

7 See the Insolvency Rules 1986, SI 1986/1925, r 4.95(1).

8 See the Insolvency Rules 1986, SI 1986/1925, r 4.95(2).

9 See the Insolvency Rules 1986, SI 1986/1925, r 4.96(1).

10 See the Insolvency Rules 1986, SI 1986/1925, r 4.96(2).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(1) GENERAL RIGHT TO PURSUE REMEDIES/(iii) Effect of Insolvency of Companies and Partnerships/521. Disclaimer by a liquidator.

521. Disclaimer by a liquidator.

Where a company is being wound up, the liquidator may disclaim onerous property¹ by giving notice even if he has taken possession of it, endeavoured to sell it or otherwise exercised rights of ownership in relation to it². Disclaimer determines the rights, interests and liabilities of the company in or in respect of the property disclaimed, as from the date of disclaimer³. Except so far as is necessary to release the company from liability, disclaimer does not affect the rights or liabilities of any other person⁴. Accordingly, where the liquidator disclaims a lease, the rights and liabilities of a subtenant or a mortgagee are not affected⁵.

The liquidator must send or give a copy of the notice of disclaimer to a mortgagee of the disclaimed property⁶. The disclaimer of any leasehold property does not take effect until such a notice has been served on every person claiming under the company as mortgagee and either no application is made for a vesting order within 14 days or, where such an application has been made, the court directs that the disclaimer is to take effect⁷.

On an application by any person who either claims an interest in the disclaimed property or who is under any liability in respect of that property, not being a liability discharged by the disclaimer, the court may make an order on such terms as it thinks fit for the vesting of the disclaimed property in or for its delivery to a person entitled to it, a person subject to such a liability or a trustee for such a person⁸. Accordingly, the landlord of a disclaimed lease which has been mortgaged by the bankrupt can apply for an order vesting the property in the mortgagee⁹. The court may not make an order vesting leasehold property in a mortgagee except on terms making him subject to the same liabilities and obligations as those to which the company was subject under the lease at the commencement of the winding up or, if the court thinks fit, to the same liabilities and obligations as the mortgagee would be subject to if the lease had been assigned to him at that time¹⁰. The court may attach conditions to an order vesting a lease in a mortgagee to ensure that he only receives what is due under the mortgage and to direct what is to be done with the surplus¹¹. If the mortgagee declines to accept the terms of that order, he is excluded from all interest in the property¹².

Any person sustaining loss or damage as a result of a disclaimer may prove for the loss or damage in the winding up as a deemed creditor of the company¹³. In assessing such loss and

damage, the effect of a vesting order must be taken into account¹⁴. An order vesting disclaimed property need not be completed by a conveyance, assignment or transfer¹⁵.

- 1 Onerous property is any unprofitable contract and any other property of the company which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act: see the Insolvency Act 1986 s 178(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 867.
- 2 See the Insolvency Act 1986 s 178; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 866 et seq.
- 3 See the Insolvency Act 1986 s 178(4)(a); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 868.
- 4 See the Insolvency Act 1986 s 178(4)(b); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 868.
- 5 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL; *Barclays Bank plc v Prudential Assurance Co Ltd* [1998] 1 EGLR 44, [1998] 10 EG 159.
- 6 See the Insolvency Rules 1986, SI 1986/1925, r 4.188; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 870.
- 7 See the Insolvency Act 1986 s 179; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 874.
- 8 See the Insolvency Act 1986 s 181; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 876. The court will not make such an order unless it appears just to do so for the purpose of compensating that person: see s 181(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 876.
- 9 See *Re Finley, ex p Clothworkers' Co* (1888) 21 QBD 475, CA.
- 10 See the Insolvency Act 1986 s 182; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 877. The latter course will be adopted provided it does not prejudice the lessor, or give undue advantage to the mortgagee: *Re Carter and Ellis, ex p Savill Bros Ltd* [1905] 1 KB 735, CA; *Re Walker, ex p Mills* (1895) 64 LJQB 783.
- 11 *Lee v Lee* [1998] 1 FLR 1018, [1998] 2 BCLC 219 (a bankruptcy case).
- 12 See the Insolvency Act 1986 s 182(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 877. See also *Re Finley, ex p Clothworkers' Co* (1888) 21 QBD 475, CA. Where a mortgagee assigns his interest to a nominee for the purpose of escaping liability under a lease on disclaimer, he remains a person entitled to the property, and must accept the terms of the vesting order or be excluded: *Re Smith, ex p Hepburn* (1890) 25 QBD 536, CA.
- 13 See the Insolvency Act 1986 s 178(6); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 879.
- 14 See the Insolvency Act 1986 s 181(5); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 876.
- 15 See the Insolvency Act 1986 s 181(6); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 876.

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522. Preferences and transactions at an undervalue.

Where a company enters administration¹ or goes into liquidation², and that company has entered into a transaction at an undervalue³ or has given a preference⁴ at a relevant time⁵, the administrator or liquidator may apply to the court for such order as it thinks fit⁶ for restoring the position to what it would have been if the transaction had not been entered into or the preference had not been given⁷. However, in the case of a transaction at an undervalue, such an order may not be made if the company entered into the transaction in good faith and for the purpose of carrying out its business and there were reasonable grounds for believing that it would benefit the company⁸. Similarly, in the case of a preference, an order may not be made unless, in giving the preference, the company was influenced by a desire to place the recipient in a better position in the event of it going into insolvent liquidation than he would have been otherwise⁹.

There are provisions similar to those governing corporate insolvency which govern the treatment of preferences and transactions in the case of personal insolvency¹⁰.

1 The company becomes subject to an administration order pursuant to the Insolvency Act 1986 s 8, Sch B1; see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145 et seq.

2 The company goes into liquidation pursuant to the Insolvency Act 1986 Pt IV (ss 73-219); see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

3 As to the meaning of 'transaction at an undervalue' see the Insolvency Act 1986 s 238(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 844. In *Re MC Bacon Ltd* [1990] BCLC 324 at 340, [1990] BCC 78 at 92, Millett J held that the creation of a security (a debenture) over a company's assets in favour of an existing creditor was not a transaction at an undervalue.

4 As to the meaning of 'preference' see the Insolvency Act 1986 s 239(4); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 846.

5 As to the relevant time for these purposes see the Insolvency Act 1986 s 240; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 850.

6 For a non-exhaustive list of the type of orders the court may make see the Insolvency Act 1986 s 241(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 851. The power to order the release or discharge (in whole or in part) of any security given by the company is specifically included: see s 241(1)(c).

7 See the Insolvency Act 1986 ss 238(3), 239(3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 845, 847.

8 See the Insolvency Act 1986 s 238(5); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 845.

9 See the Insolvency Act 1986 s 239(5); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 847. See also *Re MC Bacon Ltd* [1990] BCLC 324, [1990] BCC 78; *Re Fairway Magazines Ltd, Fairbairn v Hartigan* [1993] BCLC 643, [1992] BCC 924; *Re Agriplant Services Ltd (in liquidation)* [1997] 2 BCLC 598, [1997] BCC 842. Therefore, where a debenture is granted by a company within the relevant time which has the effect of giving a creditor security and preference over other creditors, it can be the subject of a court order only if the company was actually influenced by a desire that the creditor be so benefitted: see *Re MC Bacon Ltd* above (grant of debenture to bank was actuated by proper commercial considerations and was not a preference). See also *Re Mistral Finance Ltd (in liquidation)* [2001] BCC 27. However, where the company gives a preference to a person connected to the company (other than by reason only of being its employee) at the time of the preference, it is presumed, unless the contrary is shown, to have been influenced by such a desire: see the Insolvency Act 1986 s 239(6); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 848. See also eg *Wills v Corfe Joinery Ltd (in liquidation)* [1998] 2 BCLC 75, [1997] BCC 511. As to the objective test under previous legislation see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 847.

10 See the Insolvency Act 1986 ss 339-342; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 653-662.

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(iv) Effect of Insolvency of Individual Mortgagors

523. Effect of individual voluntary arrangement.

A debtor who wishes to make a proposal for a voluntary arrangement may apply for an interim order¹ to enable him to put a scheme of arrangement to his creditors². While an interim order is in force no proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the debtor or his property except with the leave of the court³. A mortgagee therefore needs leave to bring proceedings for possession, but does not appear to need leave to exercise the power of sale without the assistance of the court⁴. The proposed voluntary arrangement is considered at a creditors meeting, but the meeting cannot approve a proposal which affects the right of a secured creditor of the debtor to enforce his security, except with the concurrence of the creditor concerned⁵. Any interim order in force ceases to have effect 28 days after a report of a meeting approving the proposed voluntary arrangement is filed at court⁶.

In the absence of an express term or necessary inference⁷ in the voluntary arrangement, the court will be slow to imply a term that by participating in and accepting payment of a dividend under the arrangement a secured creditor has agreed to treat that part of his debt as unsecured⁸.

1 le an order under the Insolvency Act 1986 s 252: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 83 et seq.

2 See the Insolvency Act 1986 s 253; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 84.

3 See the Insolvency Act 1986 s 252(2)(b) (amended by the Insolvency Act 2000 s 3, Sch 3 paras 1, 2(b)); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 83.

4 Cf the Insolvency Act 1986 Sch B1 para 43(2) (which specifically refers to the enforcement of security); and PARA 517. As to the mortgagee's power of sale see PARA 440 et seq.

5 See the Insolvency Act 1986 s 258(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 100. As to the meaning of 'secured creditor' for these purposes see s 383; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 560.

6 See the Insolvency Act 1986 s 260(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 107.

7 See eg *Khan v Permayer* [2001] BPIR 95.

8 *Whitehead v Household Mortgage Corpn plc* [2002] EWCA Civ 1657, [2003] 1 All ER 319, [2003] 1 WLR 1173.

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524. Rights in mortgagor's bankruptcy.

In the case of the goods of an undischarged bankrupt which are held by any person by way of pledge, pawn or other security, the official receiver may give notice that he intends to inspect the goods¹. If the official receiver has served no such notice, the trustee in bankruptcy may do so². The effect of service of such a notice is that the secured creditor may not realise his security without the leave of the court unless he has given the trustee of the bankrupt's estate a reasonable opportunity to inspect the goods and to exercise the bankrupt's right of redemption³. Subject to that, the bankruptcy of the debtor does not affect the right of a secured creditor to enforce his security⁴; and for this purpose a person to whom a debt is owed who holds any security for the debt, whether a mortgage, charge, lien or other security over any property of the person by whom the debt is owed, is a secured creditor⁵. Where, however, the statutory or express power for a mortgagee either to sell⁶ or to appoint a receiver⁷ is made exercisable by reason of the mortgagor being adjudicated a bankrupt, the power is not to be exercised only on account of the adjudication, without the leave of the court⁸.

If a mortgagee realises his security, he may prove for the balance of his debt, after deducting the amount realised⁹. If a mortgagee voluntarily surrenders his security for the general benefit of creditors, he may prove for his whole debt, as if it were unsecured¹⁰. A mortgagee may, with the agreement of the trustee or the leave of the court, at any time alter the value which he has, in his proof of debt, put upon his security¹¹. However, if a mortgagee (1) being the petitioner, has in the petition put a value on his security; or (2) has voted in respect of the unsecured balance of his debt, he may re-value his security only with leave of the court¹².

If a mortgagee omits to disclose his security in his proof of debt, he must surrender his security for the general benefit of creditors, unless the court, on application by him, relieves him on the ground that the omission was inadvertent or the result of honest mistake¹³. If the court grants that relief, it may require or allow the mortgagee's proof of debt to be amended, on such terms as may be just¹⁴.

The mortgagee may allocate his security to that part of his debt in respect of which he has no right of proof¹⁵; but, as against the trustee in bankruptcy, he may not apply any part of the proceeds of sale to interest accruing due¹⁶ after the date of the bankruptcy order, although he may so apply subsequent income¹⁷.

If a mortgagee applies to the court for an order that the land belonging to the bankrupt be sold¹⁸, the proceeds of sale go first to pay the costs and expenses of the trustee, of and occasioned by the application to the court, and then in payment of the principal, interest and costs of the mortgagee, and any balance is retained by or paid to the trustee¹⁹. If the proceeds are insufficient to pay the amount due to the mortgagee, he is entitled to prove for the deficiency as a creditor²⁰.

1 See the Insolvency Act 1986 s 285(5); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

2 See the Insolvency Act 1986 s 311(5); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 399.

3 See the Insolvency Act 1986 ss 285(5), 311(6); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 218, 399.

4 See the Insolvency Act 1986 s 285(3), (4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 218, 490. Cf the position of an unsecured creditor under s 285(3): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218. As to the rights of a secured creditor on the bankruptcy of the debtor see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 560 et seq.

5 See the Insolvency Act 1986 s 383(1), (2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 560. Such a security does not include a lien on books, papers or other records, except to the extent that they consist of documents which give a title to property and are held as such: see s 383(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 560. As to liens on books see also s 349; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 696. See further *Re William Hall*

(Contractors) Ltd [1967] 2 All ER 1150, [1967] 1 WLR 948; *Re Rushton (a bankrupt), ex p National Westminster Bank Ltd v Official Receiver* [1972] Ch 197, [1971] 2 All ER 937, DC.

6 As to powers of sale see PARAS 440-441, 443 et seq.

7 See PARA 475.

8 Law of Property Act 1925 s 110(1) (amended by the Insolvency Act 1985 s 235(3), Sch 10 Pt III). This provision applies only where the mortgage deed is executed after 31 December 1925: Law of Property Act 1925 s 110(2).

9 See the Insolvency Rules 1986, SI 1986/1925, r 6.109(1).

10 See the Insolvency Rules 1986, SI 1986/1925, r 6.109(2). Inadvertent proof for the whole debt is not to be treated as an express surrender: see *C & W Berry Ltd v Armstrong-Moakes* [2007] EWHC 2101 (QB), [2008] 1 P & CR D2, [2007] All ER (D) 82 (Sep).

11 See the Insolvency Rules 1986, SI 1986/1925, r 6.115(1).

12 See the Insolvency Rules 1986, SI 1986/1925, r 6.115(2).

13 See the Insolvency Rules 1986, SI 1986/1925, r 6.116(1).

14 See the Insolvency Rules 1986, SI 1986/1925, r 6.116(2).

15 *Ex p Hunter* (1801) 6 Ves 94; *Re Medley, ex p Glyn* (1840) 1 Mont D & De G 25; *Re Bulmer, ex p Johnson* (1853) 3 De GM & G 218 at 235; *Re Fox and Jacobs, ex p Discount Banking Co of England and Wales* [1894] 1 QB 438.

16 *Re London, Windsor and Greenwich Hotels Co, Quartermaine's Case* [1892] 1 Ch 639 (where the earlier cases were discussed, and *Re Talbott, King v Chick* (1888) 39 ChD 567 was not followed). As to administration see *Ross v Ross* (1890) 25 LR Ir 362.

17 *Re London, Windsor and Greenwich Hotels Co, Quartermaine's Case* [1892] 1 Ch 639. See also *Re Barker, ex p Penfold* (1851) 4 De G & Sm 282.

18 See the Insolvency Rules 1986, SI 1986/1925, r 6.197; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415. Any person claiming to be the legal or equitable mortgagee of land belonging to the bankrupt may apply: see r 6.197. An application will be necessary only if the mortgagee is seeking to enforce an equitable charge or mortgage.

19 See the Insolvency Rules 1986, SI 1986/1925, r 6.199(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

20 See the Insolvency Rules 1986, SI 1986/1925, r 6.199(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

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525. Proceedings against a bankrupt.

At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt, the court may stay any action, execution or legal process against the property or person of the debtor or, as the case may be, of the bankrupt¹. Any court in which proceedings are pending against any individual may, on proof that a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit². Although these provisions in theory apply to proceedings which concern non-provable debts, the court is

unlikely to prevent a secured creditor from pursuing a remedy which would in any event survive the discharge of the bankrupt³.

After the making of a bankruptcy order, no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy has any remedy against the property or person of the bankrupt in respect of the debt, and no proceedings may be commenced by him against the bankrupt without the leave of the court⁴. It has been held that if proceedings are commenced without leave after the making of the bankruptcy order, leave to commence can, on a later application, be granted with retrospective effect⁵.

1 See the Insolvency Act 1986 s 285(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

2 See the Insolvency Act 1986 s 285(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

3 *Re Blake* (1875) 10 Ch App 652; *Re Hutton (a bankrupt), Mediterranean Machine Operations Ltd v Haigh* [1969] 2 Ch 201. Cf *Cobham v Dalton* (1875) 10 Ch App 655.

4 See the Insolvency Act 1986 s 285(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218. Subject to s 285(5) (inspection of goods by official receiver: see PARA 524), this does not affect the right of a secured creditor to enforce his security: see s 285(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.

5 *Re Saunders (a bankrupt)* [1997] Ch 60, [1997] 3 All ER 992; *Re Linkrealm Ltd* [1998] BCC 478. Since the Insolvency Act 1986 s 285(3) refers only to the commencement of proceedings, it is not possible to treat a later application as an application to continue earlier proceedings. In *Re Saunders* above the plaintiffs would have met with limitation problems had they been forced to start afresh: see PARA 515.

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526. Disclaimer by a trustee in bankruptcy.

A trustee in bankruptcy may disclaim onerous property in the same way as a liquidator of a company¹, subject to the proviso that: (1) a notice of disclaimer may not be given without leave of the court in respect of property claimed for the estate in the form of after-acquired property, personal property of the bankrupt exceeding reasonable replacement value or certain tenancies protected by statute²; and (2) where the trustee seeks to disclaim any property in a dwelling house, every person in occupation of or claiming a right to occupy the dwelling house must be served with a copy of the notice of disclaimer and is entitled to apply for a vesting order³.

1 See PARA 521. As to what constitutes onerous property see the Insolvency Act 1986 s 315(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 473.

2 See the Insolvency Act 1986 s 315(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 473, 478.

3 See the Insolvency Act 1986 ss 318, 320; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 482, 485.

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527. Rights against insolvent estate of deceased mortgagor.

The administration of the insolvent estate of a deceased mortgagor must be carried out under the general insolvency legislation, subject to modifications and additions¹. For these purposes, an estate of a deceased person is insolvent if, when realised, it will be insufficient to meet in full all the debts and other liabilities to which it is subject². Whether an estate is insolvent must be decided on the facts, and if there is any uncertainty, administration should proceed on the basis that it is insolvent until debts and liabilities are discharged³. The provisions currently in force cover the administration of estates both in and out of bankruptcy⁴. In either case the same rules apply as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as are in force for the time being in regard to bankrupts' estates⁵.

1 See the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 823 et seq. As to the administration of insolvent estates generally see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 399 et seq.

2 See the Insolvency Act 1986 s 421(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 824. Funeral, testamentary and administration expenses are included as liabilities of the estate: see the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 831; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 399.

3 *Re Pink, Elvin v Nightingale* [1927] 1 Ch 237 at 241 per Clauson J. See also *Re Hopkins, Williams v Hopkins* (1881) 18 ChD 370 at 377, CA, per Jessel MR.

4 See the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, arts 3, 4; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 824, 831.

5 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 831. As to the time when the security must be valued see *Cooper v Teahan* (1889) 23 LR Ir 203. As to the procedure where a mortgagor has made a composition to which the mortgagees were not parties and then died insolvent see *Re Hardy, Hardy v Farmer* [1896] 1 Ch 904.

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(2) REGULATED MORTGAGES

528. Regulation of certain mortgages by the Rent Act 1977.

A mortgage is a regulated mortgage for the purposes of the Rent Act 1977¹ if it is a legal mortgage² of land consisting of or including a dwelling house which is let on or subject to a regulated tenancy³, and the regulated tenancy is binding on the mortgagee⁴. However, a mortgage is not a regulated mortgage for these purposes if either the rateable value of the dwelling house⁵ is less than 10 per cent of the rateable value of the whole of the land comprised in the mortgage⁶, or the mortgagor is in breach of covenant⁷.

1 The provisions of the Rent Act 1977 which regulate mortgages (ie Pt X (ss 129-136)) apply to all regulated mortgages created before the relevant date: see the Rent Act 1977 s 129(1)(a). For these purposes, 'relevant date': (1) in a case where, on 28 November 1967, land consisting of or including a dwelling house was subject

to a long tenancy which became a regulated tenancy on that date by virtue of the Leasehold Reform Act 1967 s 39 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1196 et seq), means, in relation to that land, 28 November 1967 (Rent Act 1977 s 129(2)(a)); (2) in a case where, on 22 March 1973, land consisting of or including a dwelling house was subject to a tenancy which became a regulated tenancy by virtue of the Counter-Inflation Act 1973 s 14 (repealed) (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 855), means, in relation to that land, 22 March 1973 (Rent Act 1977 s 129(2)(b)); (3) in the case of land consisting of or including a dwelling house subject to a regulated furnished tenancy, means, in relation to that land, 14 August 1974 (s 129(2)(c)); and (4) in any other case, means 8 December 1965 (s 129(2)(d)). As to the meaning of 'regulated furnished tenancy' see s 152(1); and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 812.

2 For the purposes of the Rent Act 1977 Pt X, except where the context otherwise requires, 'legal mortgage', in relation to regulated mortgages, includes any registered charge within the meaning of the Land Registration Act 2002 (see PARA 159 note 7) (see the Rent Act 1977 s 136(b) (amended by the Housing Act 1980 Sch 25 para 50; and the Land Registration Act 2002 s 133, Sch 11 para 14)); and, for the purposes of the Rent Act 1977 s 131, includes a charge by way of legal mortgage (see s 131(4)). As to the meaning of 'legal mortgage' generally see PARA 104 note 1.

3 Rent Act 1977 ss 129(1)(b), 131(1)(a) (s 129(1)(b) substituted, s 131(1) amended, by the Housing Act 1980 s 152, Sch 25 para 48, Sch 26). As to the meaning of 'regulated tenancy' see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 854.

4 Rent Act 1977 s 131(1)(b). 'Mortgagee' and 'mortgagor' include any person from time to time deriving title under the original mortgagee or mortgagor: s 136(a). As to the meanings of 'mortgagee' and 'mortgagor' generally see PARA 104 note 1.

5 Or, if there is more than one such dwelling house comprised in the mortgage, the aggregate of the rateable values of those dwelling houses: Rent Act 1977 s 131(2)(a). As to the meaning of 'rateable value' for these purposes see s 25; and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 859.

6 Rent Act 1977 s 131(2)(a). The rateable value for these purposes is that assessed on the appropriate day. As to the appropriate day see s 25; and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 859. Section 131(2)(a) has effect, in the case of land consisting of or including a dwelling house which on 22 March 1973 was subject to a tenancy which became a regulated tenancy by virtue of the Counter-Inflation Act 1973 s 14 (repealed), as if for reference to the appropriate day there were substituted a reference to 7 March 1973: Rent Act 1977 s 131(3).

7 Rent Act 1977 s 131(2)(b). For this purpose, a breach of the covenant for the repayment of the principal money otherwise than by instalments is disregarded: s 131(2)(b).

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529. Mitigation of hardship under regulated mortgages.

The power of the court¹ to mitigate hardship under regulated mortgages² becomes exercisable only on an application made by the mortgagor³ within 21 days, or such longer time as the court may allow, after the rate of interest payable in respect of the mortgage being increased⁴, a rent for a dwelling house comprised in the mortgage being registered⁵ (provided such registered rent is lower than the rent payable immediately before the registration)⁶, or the mortgagee demanding payment of the principal money secured by the mortgage or taking any steps for exercising any right of foreclosure or sale or otherwise enforcing his security⁷.

If the court is satisfied on any such application that, by reason of the event in question and of the operation of the Rent Act 1977, the mortgagor would suffer severe financial hardship unless relief were given, the court may by order⁸ make such provision as it thinks appropriate, limiting the rate of interest⁹, extending the time for repayment of the principal money¹⁰, or otherwise varying the terms of the mortgage or imposing any limitation or condition on the exercise of any right or remedy in respect of it¹¹. Where the court makes such an order in relation to a mortgage which comprises other land as well as a dwelling house or dwelling

houses subject to a regulated tenancy¹², then, if the mortgagee so requests, the order may make provision for apportioning the money secured by the mortgage between that other land and the dwelling house or dwelling houses¹³. Where such an apportionment is made, the other provisions of the order do not apply in relation to the other land, and the mortgage has effect for all purposes as two separate mortgages of the apportioned parts¹⁴.

1 For the purposes of the Rent Act 1977 s 132, the court is the county court, except that where an application is made in pursuance of any step taken by the mortgagee in the High Court, it is the High Court: s 132(6). As to the meaning of 'mortgagee' see PARA 528 note 4.

2 As to the meaning of 'regulated mortgage' see PARA 528.

3 As to the meaning of 'mortgagor' see PARA 528 note 4.

4 Rent Act 1977 s 132(1)(a) (s 132(1) amended by the Housing Act 1980 s 152, Sch 25 para 49).

5 If registered under the Rent Act 1977 Pt IV (ss 62-75): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 909 et seq.

6 Rent Act 1977 s 132(1)(b) (as amended: see note 4). This provision does not apply to a case falling within s 129(2)(b) (see PARA 528 note 1): s 132(1).

7 Rent Act 1977 s 132(1)(c) (as amended: see note 4). The mortgagee must not be a mortgagee who was in possession on the relevant date: s 132(1)(c). As to the relevant date see PARA 528 note 1.

8 Where the court has made an order under these provisions it may vary or revoke it by a subsequent order: Rent Act 1977 s 132(5).

9 Rent Act 1977 s 132(2)(a).

10 Rent Act 1977 s 132(2)(b).

11 Rent Act 1977 s 132(2)(c).

12 As to the meaning of 'regulated tenancy' see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 854.

13 Rent Act 1977 s 132(3).

14 See the Rent Act 1977 s 132(4).

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(3) LEGAL PROCEEDINGS IN GENERAL

(i) Jurisdiction

530. Jurisdiction of High Court and county court.

In general, the High Court has jurisdiction to determine any proceedings by a mortgagor or mortgagee to enforce the terms of a mortgage, although in practice most mortgage claims are brought in a county court¹. The High Court does not have jurisdiction to hear and determine proceedings in which a mortgagee claims possession and the mortgaged property consists of or includes a dwelling house², as those proceedings must, except where any part of the land is situated in Greater London³, be brought in a county court⁴. The county court also has exclusive jurisdiction to hear and determine any action by the creditor to enforce any security relating to an agreement regulated under the Consumer Credit Act 1974⁵. By virtue of its general

jurisdiction in contract, a county court has unlimited jurisdiction to hear and determine a claim by a mortgagee for payment of principal and interest⁶.

A county court has all the jurisdiction of the High Court to hear and determine proceedings for foreclosure or redemption of any mortgage, or for enforcing any charge or lien, where the amount owing in respect of the mortgage, charge or lien does not exceed the county court limit⁷. Where the original loan exceeds that limit but has been reduced below that amount by payment or otherwise, the county court has jurisdiction⁸. A county court also has all the jurisdiction of the High Court to hear and determine proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value the county court limit⁹. The jurisdiction may be extended beyond the financial limits by agreement¹⁰. Even where the loan or the amount of the loan outstanding exceeds the county court limit, a county court has unlimited jurisdiction to hear and determine any claim for possession by a mortgagee, as it is a claim for the recovery of land¹¹.

Under the statutory provisions which relate to the power of the court to except the leasehold reversion from the conveyance on the realisation of a leasehold mortgage¹², the realisation of equitable charges by the court¹³, the sale of mortgaged property in claims for redemption or foreclosure¹⁴, and the power of the court to authorise land and minerals to be dealt with separately¹⁵, the county court has jurisdiction where the amount owing in respect of the mortgage or charge at the date of the commencement of the proceedings does not exceed a specified sum¹⁶.

A county court also has unlimited jurisdiction to make an order on the application of a person who has an interest in a property subject to a trust of land¹⁷, such as a chargee of an equitable interest seeking an order for sale¹⁸.

1 As to allocation of proceedings between the High Court and county court see PARA 531.

2 'Dwelling house' includes any building or part of a building which is used as a dwelling (County Courts Act 1984 s 21(7)); and the fact that part of the premises comprised in a dwelling house is used as a shop or office or for business, trade or professional purposes does not prevent the dwelling house from being a dwelling house (s 21(8)).

3 As to the area comprising Greater London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 29.

4 See the County Courts Act 1984 s 21(3); and **COURTS** vol 10 (Reissue) PARA 715. For the procedure relating to possession claims see PARA 546 et seq. This exclusive jurisdiction of a county court does not apply, however, to proceedings for foreclosure or sale in which a claim for possession of the mortgaged property is also made: see s 21(4); and **COURTS** vol 10 (Reissue) PARA 715. The claim for foreclosure or sale must be a genuine one for that relief and not merely added as a colourable device to take the proceedings outside the county court's exclusive jurisdiction: see *Trustees of Manchester Unity Life Insurance Collecting Society v Sadler* [1974] 2 All ER 410, [1974] 1 WLR 770; *Lord Marples of Wallasey v Holmes* (1975) 31 P & CR 94; *PB Frost Ltd v Green* [1978] 2 All ER 206, [1978] 1 WLR 949. It is commonplace to claim payment, possession, foreclosure or sale and other relief in the same proceedings, but the mere claim for foreclosure or sale does not make the action one for foreclosure or sale; the test is what is the claimant genuinely seeking: see *Trustees of Manchester Unity Life Insurance Collecting Society v Sadler* above. If a claimant abandons his claim for possession, leaving a claim for payment outstanding, the High Court has jurisdiction: see *National Westminster Bank Ltd v Oceancrest Ltd* (1985) Times, 24 April, CA. A claim for money in which county courts have jurisdiction may be commenced in the High Court only if the financial value of the claim exceeds £25,000: see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 4A; and **COURTS** vol 10 (Reissue) PARA 579; **CIVIL PROCEDURE** vol 11 (2009) PARA 116. Whether the matter is heard in the county court or the High Court, the court has the powers of adjournment given by the Administration of Justice Act 1970: see PARA 554 et seq.

5 See the Consumer Credit Act 1974 s 141; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 288.

6 See the County Courts Act 1984 s 15(1); and **COURTS** vol 10 (Reissue) PARA 712.

7 See the County Courts Act 1984 s 23(c); and **COURTS** vol 10 (Reissue) PARA 719. As to the county court limit see **COURTS** vol 10 (Reissue) PARA 710. As to the transfer of proceedings from the High Court to a county court see s 40; and **CIVIL PROCEDURE** vol 11 (2009) PARA 69.

- 8 *Shields, Whitley and District Amalgamated Model Building Society v Richards* (1901) 84 LT 587.
- 9 See the County Courts Act 1984 s 23(g); and **COURTS** vol 10 (Reissue) PARA 719.
- 10 See the County Courts Act 1984 s 24(1), (2)(g); and **COURTS** vol 10 (Reissue) PARA 719.
- 11 See the County Courts Act 1984 s 21(1); and **COURTS** vol 10 (Reissue) PARA 715. A claim for possession is a claim for the recovery of land: *R v Judge Dutton Briant, ex p Abbey National Building Society* [1957] 2 QB 497, [1957] 2 All ER 625; *West Penwith RDC v Gunnell* [1968] 2 All ER 1005, [1968] 1 WLR 1153, CA; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358 at 365, [1975] 1 WLR 1474 at 1481 per Walton J; cf *Redditch Benefit Building Society v Roberts* [1940] Ch 415 at 420, [1940] 1 All ER 342 at 345, CA, per Clayton LJ.
- 12 See PARA 446.
- 13 See PARA 570.
- 14 See PARAS 570-572, 671.
- 15 See PARA 464.
- 16 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(4). The sum specified is £30,000: see art 2(4).
- 17 See under the Trusts of Land and Appointment of Trustees Act 1996 s 14: see **TRUSTS** vol 48 (2007 Reissue) PARA 1038.
- 18 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(p); and **CIVIL PROCEDURE** vol 11 (2009) PARA 58. As to orders for sale see PARA 616 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(3) LEGAL PROCEEDINGS IN GENERAL/(i) Jurisdiction/531. Allocation between High Court and county court.

531. Allocation between High Court and county court.

Generally, proceedings in which both the county courts and the High Court have jurisdiction may be commenced in either court¹, and may be tried in the High Court or in a county court². A possession claim³ by a mortgagee⁴ must be started in the county court for the district in which the land is situated⁵ unless either an enactment provides otherwise⁶ or the mortgagee files with his claim form a certificate stating the reasons for bringing the claim in the High Court verified by a statement of truth⁷. Only exceptional circumstances justify starting such a claim in the High Court⁸.

1 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, arts 4, 4A, 5, 6, 6A; **CIVIL PROCEDURE** vol 11 (2009) PARAS 58, 116; **COURTS** vol 10 (Reissue) PARA 579. Proceedings (other than those which include a claim for damages in respect of personal injury) may not be started in the High Court unless the value of the claim is £25,000 or more: see art 4A; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116; **COURTS** vol 10 (Reissue) PARA 579.

2 As to case management see also CPR Pts 26, 29; *Practice Direction--The Multi-Track* PD 29 paras 2.1-2.6; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 246 et seq, 293 et seq. An undue influence claim is suitable for trial in the High Court: see *Practice Direction--The Multi-Track* PD 29 para 2.6(3); and **CIVIL PROCEDURE** vol 11 (2009) PARA 294. As to undue influence generally see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 839-853. As to the criteria for a transfer see CPR 30.3; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 66, 69.

3 For these purposes, 'possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings): CPR 55.1(a).

4 For these purposes, 'mortgage' includes a legal or equitable mortgage and a legal or equitable charge; and 'mortgagee' is to be interpreted accordingly: CPR 55.1(c).

5 See CPR 55.3(1).

6 As to the limitation on the jurisdiction of county courts to hear possession claims see PARA 530.

7 See CPR 55.3(2). For the procedure relating to possession claims see PARA 546 et seq. As to statements of truth see CPR Pt 22; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 613-616.

8 See CPR 55.3(3); *Practice Direction--Possession Claims* PD 55 para 1.1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116. A claim may be started in the High Court if, for example, there are complicated disputes of fact or points of law of general importance: *Practice Direction--Possession Claims* PD 55 para 1.3(1), (2). The value of the property and the amount of any financial claim may be relevant circumstances, but these factors alone will not normally justify starting the claim in the High Court: *Practice Direction--Possession Claims* PD 55 para 1.4. If a claimant starts a claim in the High Court and the court decides that it should have been started in the county court, the court will normally either strike the claim out or transfer it to the county court on its own initiative, and this will have costs implications: see *Practice Direction--Possession Claims* PD 55 para 1.2.

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(ii) Procedure generally

532. Procedure for mortgage claims.

Most legal proceedings falling within the scope of this title are governed by the general procedural code set out in the Civil Procedure Rules¹. The only types of mortgage claim which are subject to specific procedural rules are possession claims² by a mortgagee³ and claims to enforce charging orders by sale⁴. All other mortgage claims are brought under the Pt 8 alternative procedure⁵, as appropriately modified⁶.

1 As to the Civil Procedure Rules see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 As to the meaning of 'possession claim' see PARA 531 note 3. For the procedure relating to possession claims see PARA 546 et seq.

3 As to the meaning of 'mortgagee' see PARA 531 note 4.

4 As to enforcement of charging orders by sale see CPR 73.10; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482.

5 See **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

6 See *Practice Direction--Alternative Procedure for Claims* PD 8; and **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

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533. Commencement of mortgage claim in the High Court.

A mortgage possession claim¹ in the High Court will be assigned to the Chancery Division². Other mortgage claims in the High Court are also normally commenced there³, although claims

in respect of a mortgage or charge on a ship or any share in a ship lie within the Admiralty jurisdiction of the High Court⁴.

1 As to the meaning of 'possession claim' see PARA 531 note 3.

2 See *Practice Direction--Possession Claims* PD 55 para 1.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116. For the procedure relating to possession claims see PARA 546 et seq.

3 See *Practice Direction--How to Start Proceedings* PD 7 para 2.5; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116.

4 See the Senior Courts Act 1981 Sch 1 para 2(c); and **COURTS** vol 10 (Reissue) PARA 613; **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 91. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

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534. Commencement of claim in county court.

Where a claimant is making a claim in the county court for:

- 58 (1) possession of land¹;
- 59 (2) enforcing any charge or lien on land; or
- 60 (3) the recovery of moneys secured by a mortgage or charge on land²,

the claim must be started in the court for the district in which the land or any part of the land is situated³.

1 For the procedure relating to possession claims see PARA 546 et seq.

2 As to claims for payment see PARA 535 et seq.

3 See CPR 55.3(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 116.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(4) CLAIM ON COVENANT FOR PAYMENT/(i) Who may Sue/535. Claim by mortgagee and those claiming under him.

(4) CLAIM ON COVENANT FOR PAYMENT

(i) Who may Sue

535. Claim by mortgagee and those claiming under him.

A claim on the covenant for payment¹ contained in the mortgage deed can be brought by the mortgagee and those claiming the mortgage security under him, whether by devolution on death² or by alienation inter vivos. Accordingly, if the mortgagee has not assigned the mortgage, the right to sue passes on his death to his personal representatives, and, if he has specifically bequeathed the mortgage, the mortgage debt and the right to sue for it will vest in

the legatee upon the executors' assent to the bequest being given³, although it is usual for the executors to transfer the mortgage security to the legatee in the short statutory form⁴. If the mortgagee or his personal representatives transfer the mortgage, the right to sue on the covenant vests in the transferee on his giving notice in writing of the transfer to the mortgagor⁵.

1 As to the implied personal obligation on the mortgagor in the express covenant see PARA 208.

2 See the Administration of Estates Act 1925 ss 1(1), 3(1)(ii), 36; and PARAS 387-391.

3 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 371.

4 See PARA 374.

5 See **CHOSSES IN ACTION** vol 13 (2009) PARA 76 et seq. It is not open to a party seeking to recover payment of money secured by a mortgage or charge to claim at the hearing that the money was payable only under a bare covenant: see *William Hill (Park Lane) Ltd v Hofman* [1950] 1 All ER 1013.

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536. Claim by mortgagees as trustees.

Where the mortgagees are trustees, the beneficiaries are not entitled to sue on the covenant for payment unless it appears that the beneficiaries were intended to have the benefit of the contract of mortgage¹ or if the trustees fail in their duty to protect the trust estate or the interests of the beneficiaries in the trust estate². The beneficiaries must call upon the trustees either to sue, or to allow the beneficiaries to sue³. Alternatively, a beneficiary may make an application seeking an order that the trustees bring a claim⁴. Similarly, where debentures or debenture stock are secured by a trust deed, the right to claim is in the trustees and not in the debenture holders or debenture stockholders⁵, unless there is a direct covenant with the holders⁶.

1 *Gandy v Gandy* (1885) 30 ChD 57, CA; *Kelly v Larkin and Carter* [1910] 2 IR 550. See also **CONTRACT** vol 9(1) (Reissue) PARAS 761-762.

2 *Hayim v Citibank NA* [1987] AC 730, [1987] 3 WLR 83, PC. See also CPR 19.7A; and **CIVIL PROCEDURE** vol 11 (2009) PARA 225.

3 *Re Booth and Kettlewell's Contract* (1892) 67 LT 550. See also **TRUSTS** vol 48 (2007 Reissue) PARA 1081.

4 See under the Trusts of Land and Appointment of Trustees Act 1996 s 14: see **TRUSTS** vol 48 (2007 Reissue) PARA 1038.

5 *Re Uruguay Central and Hygueritas Rly Co of Monte Video* (1879) 11 ChD 372 at 383; *Re Dunderland Iron Ore Co Ltd* [1909] 1 Ch 446.

6 *Re Olathe Silver Mining Co* (1884) 27 ChD 278 at 283. See also **COMPANIES** vol 15 (2009) PARA 1299 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(4) CLAIM ON COVENANT FOR PAYMENT/(ii) When Right to Claim Arises/537. Covenant to pay on or on or after a certain day.

(ii) When Right to Claim Arises

537. Covenant to pay on or on or after a certain day.

Where a day for payment is fixed by the covenant¹, the right to claim arises upon non-payment on that day, as the affirmative covenant implies that the lender will not sue before that day². Consequently, a substituted covenant taken by the mortgagee for payment at a date subsequent to that originally fixed is a binding arrangement to give time, and ordinarily discharges a surety³. If the covenant also fixes a place for payment, the creditor must attend there to receive payment, and there is no default unless he does so⁴. The claim on the covenant is for principal and interest only and any other sums which the mortgagor has covenanted to pay, not for expenses incurred by the mortgagee outside the covenant, although he may be entitled to these in a redemption or foreclosure claim⁵. If a bond has been given for the mortgage debt, the amount recoverable for principal and interest is, in general, limited to the amount of the penalty, and no more is recoverable against the mortgaged property if the mortgage is to secure the bond debt⁶, but it is otherwise if the mortgage is for the principal sum and interest without reference to the bond⁷. A covenant to pay on or after a certain date gives the covenantee the right to payment at any time after that date, although possibly demand must first be made⁸.

1 As to the effect of a covenant to repay the principal by instalments see PARA 211.

2 *Bolton v Buckenham* [1891] 1 QB 278 at 281, CA; *Twentieth Century Banking Corp Ltd v Wilkinson* [1977] Ch 99, [1976] 3 All ER 361.

3 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1224.

4 *Thorn v City Rice Mills* (1889) 40 ChD 357. See also **CONTRACT** vol 9(1) (Reissue) PARA 938.

5 *Re Sneyd, ex p Fewings* (1883) 25 ChD 338, CA. See further PARAS 592, 667.

6 *Hughes v Wynne* (1832) 1 My & K 20.

7 *Clarke v Lord Abingdon* (1810) 17 Ves 106; *Mathews v Keble* (1867) LR 4 Eq 467 (on appeal (1868) 3 Ch App 691).

8 *Re Tewkesbury Gas Co, Tysoe v Tewkesbury Gas Co* [1911] 2 Ch 279; affd [1912] 1 Ch 1, CA. As to an implied demand see *The Halcyon Skies (No 2)* [1977] 1 Lloyd's Rep 22.

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538. Principal payable on demand.

When the principal sum is payable on demand, and there is no provision, express or implied, for notice to be given, the necessity for notice depends on whether the covenant is direct or collateral. If it is direct, that is, if it secures the covenantor's own debt and is not merely a collateral security for that debt, no actual demand is required and the right of action accrues immediately on the money being advanced¹. If, however, the covenant is collateral, where, for instance, it is to secure the debt of another or to secure an ordinary banking overdraft between the covenantor and his banker, it seems that the claim may not be brought until after actual demand².

Where on the true construction of the mortgage deed there is a provision, express or implied, for notice to be given, actual demand in writing must be made before the right to claim arises³, and any other condition prescribed as a preliminary to suing on the covenant must be observed⁴. In the case of an instalment mortgage, a demand is necessary, because of the change in the nature of the debtor's obligation from instalments to lump sum⁵. Any mode of service is sufficient which brings home to the mortgagor the fact that the demand has been made⁶. A notice is still an effective demand even if it overstates the amount due⁷.

Where a loan is repayable on demand, the mortgage may provide for a demand to be deemed to have been duly made, even if not received, if certain formalities are observed. However, where a demand is actually made and effectively communicated, it is not necessary to observe any formalities and consequently an implied demand will be effective⁸. A demand is made by any clear intimation that payment is required⁹.

1 *Norton v Ellam* (1837) 2 M & W 461; *Jackson v Ogg* (1859) John 397; *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300 at 304; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. See also **LIMITATION PERIODS** vol 68 (2008) PARA 958.

2 *Birks v Trippet* (1666) 1 Wms Saund 28; *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Lloyds Bank Ltd v Margolis* [1954] 1 All ER 734, [1954] 1 WLR 644; *Habib Bank Ltd v Tailor* [1982] 3 All ER 561, [1982] 1 WLR 1218, CA. See also **LIMITATION PERIODS** vol 68 (2008) PARAS 968, 977, 1125. It has been held that a bond to secure money payable on demand is not forfeited until after demand (*Carter v Ring* (1813) 3 Camp 459), but the distinction is doubtful (see *Re Brown's Estate, Brown v Brown*).

3 *Lloyds Bank Ltd v Margolis* [1954] 1 All ER 734, [1954] 1 WLR 644. As to the length of notice required see PARA 210. See also **LIMITATION PERIODS** vol 68 (2008) PARA 1125.

4 See *Rogers & Co v British and Colonial Colliery Supply Association* (1898) 68 LJQB 14, where a debenture stockholder's right to claim depended on previous notice to the debenture stock trustees and default by them in suing. As to the allowance of a reasonable time for obtaining the money from the debtor's bankers see PARAS 209-210.

5 *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. As to payment by instalments see PARA 211.

6 *Worthington & Co Ltd v Abbott* [1910] 1 Ch 588. See also *Belding v Read* (1865) 3 H & C 955 at 963; *Massey v Sladen* (1868) LR 4 Exch 13 (demand either personally or by service at place of business).

7 *Campbell v Commercial Bank of Sydney* (1879) 40 LT 137, PC; *Fox v Jolly* [1916] 1 AC 1, HL; *Clyde Properties Ltd v Tasker* [1970] NZLR 754. As to the binding effect of statements given under the Consumer Credit Act 1974 see s 172; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 303.

8 *The Halcyon Skies (No 2)* [1977] 1 Lloyd's Rep 22.

9 *Re Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd* (1905) 6 SR NSW 6, NSW SC; *Re a Company* [1985] BCLC 37.

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(iii) Who may be Sued

539. Mortgagor and his surety.

The claim on the covenant may be brought against the mortgagor and against any person who has joined with him in the covenant or has given a separate covenant as surety¹. The mortgagor cannot without the mortgagee's consent rid himself of his liability under the

covenant for payment of the mortgage debt by transferring the equity of redemption². Words added to a covenant excluding personal liability may be repugnant, and the full liability remain³, but it is permissible to qualify the covenant, and accordingly a covenant by a trustee may in terms limit his liability to the time while he is a trustee⁴.

1 See *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. As to suretyship see PARA 146 et seq.

2 See PARA 540; and **CONTRACT** vol 9(1) (Reissue) PARA 757. Cf *West Bromwich Building Society v Bullock* [1936] 1 All ER 887 (mortgage to building society; rules of the society provided that on transfer of the equity of redemption the board of the society might grant the original mortgagor release from future liability; the mortgagor was liable despite a transfer in absence of release). See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2019.

3 *Furnivall v Coombes* (1843) 5 Man & G 736.

4 *Williams v Hathaway* (1877) 6 ChD 544. See also PARA 179.

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540. Assignee of equity of redemption.

The covenant for payment of the mortgage debt does not run with the land, and so the assignee of the equity of redemption is not liable to be sued on it by the mortgagee¹. This is in accordance with the rules that, except as between lessor and lessee, the burden of the covenant does not run with the land at law and the burden of a positive covenant does not run with the land in equity². If, however, the assignee is a purchaser on sale, he usually enters into a covenant to indemnify the mortgagor against the debt, and, in the absence of an express covenant³, a covenant of indemnity is implied⁴. The benefit of the covenant of indemnity is in general assignable⁵. The assignee may make himself directly liable by entering into a fresh covenant with the mortgagee, but such liability is not implied from the mere payment of interest⁶.

1 *Re Errington, ex p Mason* [1894] 1 QB 11. As to the equity of redemption see PARAS 107, 302 et seq.

2 See **EQUITY** vol 16(2) (Reissue) PARA 613 et seq; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 554 et seq. See also **SALE OF LAND** vol 42 (Reissue) PARA 331 et seq. The bringing of a claim against the mortgagor gives him a new right to redeem: see PARA 304. See also *Re Richardson, ex p Governors of St Thomas's Hospital* [1911] 2 KB 705, CA, where proceedings were brought in the joint names of a lessor and a lessee to enforce a covenant of indemnity.

3 *Waring v Ward* (1802) 7 Ves 332 at 337; *Bridgman v Daw* (1891) 40 WR 253; *Adair v Carden* (1892) 29 LR 469; *Dodson v Downey* [1901] 2 Ch 620.

4 *Mills v United Counties Bank Ltd* [1912] 1 Ch 231, CA, doubting on this point [1911] 1 Ch 669 (decision of Eve J). The implied covenant is excluded by an express covenant for indemnity: *Mills v United Counties Bank Ltd* above.

5 See *Shore v Shore* (1847) 2 Ph 378.

6 *Re Errington, ex p Mason* [1894] 1 QB 11.

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541. Personal representatives and beneficiaries.

On the death of the mortgagor, a claim on the covenant lies against his personal representatives, and the judgment can be enforced against them to the extent of the assets remaining unadministered¹. The mortgagee also has the remedies of a creditor against any person to whom any beneficial interest of the mortgagor not comprised in the mortgage devolves or is given², and the remedy, common to specialty and simple contract creditors, of having the mortgagor's real and personal estate administered by the court and applied rateably in satisfaction of debts of both classes³. If personal estate of the mortgagor has been paid to legatees, the mortgagee can follow it in their hands and make them refund⁴. The mortgagee may sue in his own name alone for administration of real or personal estate⁵.

1 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 371.

2 Lie under the Administration of Estates Act 1925 s 32(2): see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 388. See also *Re Lacey, Howard v Lightfoot* [1907] 1 Ch 330 at 347, CA; *Worthington & Co Ltd v Abbott* [1910] 1 Ch 588 at 598, where the terms of the order are set out. As to the effect of an acknowledgment given by the devisee see **LIMITATION PERIODS** vol 68 (2008) PARA 1216.

3 See the Administration of Estates Act 1925 s 32; and **EQUITY** vol 16(2) (Reissue) PARAS 461-462; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 387-388.

4 See eg *Re Eustace, Lee v McMillan* [1912] 1 Ch 561. See also **EQUITY** vol 16(2) (Reissue) PARA 916; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 519. An assent or conveyance by a personal representative to a person other than a purchaser does not prejudice the right to follow property: see the Administration of Estates Act 1925 s 38(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 388. As to the mortgagee being barred by acquiescence in the distribution of the assets see **EQUITY** vol 16(2) (Reissue) PARA 916.

5 *Re James, James v Jones* [1911] 2 Ch 348. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 387. As to proof by the mortgagee against an insolvent estate see PARA 527.

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(iv) Loss of Right to Claim

542. Loss of right by foreclosure and sale.

A mortgagee who has foreclosed and subsequently sold the property is precluded from suing on the covenant for payment¹, but this principle does not apply to a sale under the mortgagee's power of sale² or under the order of the court³, and, if it does not realise enough to pay off the mortgage, he may sue for the deficiency⁴. The mortgagee may be restrained from suing if he cannot hand back the title deeds⁵. These principles are applicable not only to real property, but also to shares deposited as security with a broker, so that, if they have been wrongfully sold, the broker may not sue for the balance due, but if the shares are readily purchasable their money value may be substituted⁶.

The mortgagee is not prevented from suing if his inability to restore the property is due to the intervention of a third person, as in the case of a forfeiture of leasehold property by the

landlord, not due to the mortgagee's default⁷. If the mortgagee holds bills of exchange as collateral security and retains them on transferring the mortgage, he may not sue on them pending a claim for redemption⁸.

1 *Lloyds and Scottish Trust Ltd v Britten* (1982) 44 P & CR 249, [1982] LS Gaz R 1291. As to foreclosure see PARA 566 et seq.

2 See PARA 614.

3 *Gordon Grant & Co v Boos* [1926] AC 781, PC.

4 *Rudge v Richens* (1873) LR 8 CP 358; *Re McHenry, McDermott v Boyd Barker's Claim* [1894] 3 Ch 290, CA; *Bristol & West plc v Bartlett* [2002] EWCA Civ 1181, [2002] 4 All ER 544, [2003] 1 WLR 284.

5 *Schoole v Sall* (1803) 1 Sch & Lef 176. As to the delivery of title deeds see PARA 651.

6 *Ellis & Co's Trustee v Dixon-Johnson* [1925] AC 489, HL. As to the deposit of share certificates see PARA 140.

7 *Re Burrell, Burrell v Smith* (1869) LR 7 Eq 399. As to forfeiture of leasehold property see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 603 et seq.

8 *Walker v Jones* (1866) LR 1 PC 50. As to bills of exchange see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(4) CLAIM ON COVENANT FOR PAYMENT/(iv) Loss of Right to Claim/543. Loss of right by lapse of time.

543. Loss of right by lapse of time.

The right to claim for principal money is liable to be barred by lapse of time. The period applicable will normally be a period of six years from the date when the cause of action arose¹.

1 See PARA 515.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(4) CLAIM ON COVENANT FOR PAYMENT/(v) Procedure/544. Form of proceedings in the High Court.

(v) Procedure

544. Form of proceedings in the High Court.

If the claim for payment includes a claim for possession of land, the procedure applicable to a possession claim¹ applies².

If the claim for payment does not include such a claim, the claim is brought under the Pt 8 alternative procedure³, as appropriately modified⁴.

1 As to the meaning of 'possession claim' see PARA 531 note 3.

2 See CPR Pt 55; and PARAS 531, 546 et seq.

3 See **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

4 See *Practice Direction--Alternative Procedure for Claims* PD 8; PARA 532; and **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(4) CLAIM ON COVENANT FOR PAYMENT/(v) Procedure/545. Procedure in the county court.

545. Procedure in the county court.

If the claim for payment includes a claim for possession of land, the procedure applicable to a possession claim¹ applies².

If the claim for payment does not include such a claim, the claim is brought under the Pt 8 alternative procedure³, as appropriately modified⁴.

1 As to the meaning of 'possession claim' see PARA 531 note 3.

2 See CPR Pt 55; and PARAS 531, 546 et seq.

3 See **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

4 See *Practice Direction--Alternative Procedure for Claims* PD 8; PARA 532; and **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/546. Jurisdiction and procedure.

(5) PROCEEDINGS FOR POSSESSION

546. Jurisdiction and procedure.

Most claims by a mortgagee for possession must be brought under the Civil Procedure Rules¹ in the county court² and what is, in essence, a possession claim is treated as such, notwithstanding that the relief claimed includes foreclosure or other relief³. Only in exceptional circumstances may claims for possession be brought in the Chancery Division of the High Court⁴.

Before proceedings are begun it should be confirmed that the right to possession has arisen⁵ and any necessary notice given⁶.

1 See CPR 55.2(1)(a)(ii). See further CPR 55.1-55.10; and PARA 548 et seq. The application of these provisions is subject to any enactment or practice direction which sets out special provisions with regard to any particular category of claim: see CPR 55.2(2)(a); *Practice Direction--Possession Claims* PD 55; and PARA 548 et seq.

2 See PARAS 530-531.

3 See PARA 530.

4 See PARAS 530-531.

5 As to the mortgagee's right to possession see PARA 402 et seq.

6 Eg a notice to quit might be necessary: see PARA 344. A subsequent mortgagee should give notice to any prior mortgagee of his intention to apply for possession. As to transfers of prior mortgages see PARA 364 et seq. A mortgagee who seeks possession of land which consists of or includes residential property must, within five days of receiving notification of the date of the hearing by the court, send a notice in the specified form to the tenant or occupier of the property: see CPR 55.10; and PARA 550.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/547. Necessary parties to proceedings.

547. Necessary parties to proceedings.

If there are several mortgagors in a claim for possession¹ they should all be joined², but, if they are not all in occupation and it is not possible to serve³ any or all of those not in occupation, only those in occupation and the others on whom service can be effected without difficulty need be served⁴. Where the mortgagor is bankrupt, his trustee in bankruptcy should not be joined, unless the court directs otherwise⁵.

The only other persons who need to be made defendants are those persons having an independent right to remain in occupation⁶. A spouse or civil partner who asserts that he or she is entitled⁷ to take over the obligations of the mortgage and shows that there is a real prospect in the near future of him or her redeeming the mortgage should be made a defendant⁸. If the mortgagor is not in occupation, the occupier should normally be made defendant⁹. If, after proceedings properly begun against the mortgagor alone, the mortgagee discovers another person in occupation, the mortgagee may be ordered to give notice of his application to that other person¹⁰.

1 For the procedure relating to possession claims see PARAS 546, 548 et seq.

2 After the original mortgagor has parted with the property, he should not be made a defendant in respect of a claim for possession: *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474.

3 As to the methods by which service may be made see CPR Pt 6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 138 et seq.

4 *Alliance Building Society v Yap* [1962] 3 All ER 6n, [1962] 1 WLR 857. As to the need to give notice to occupiers see PARA 550.

5 *Alliance Building Society v Shave* [1952] Ch 581, [1952] 1 All ER 1033.

6 *Brighton and Shoreham Building Society v Hollingdale* [1965] 1 All ER 540, [1965] 1 WLR 376.

7 Under the Family Law Act 1996 s 30(3): see PARA 306; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 285.

8 See *Hastings and Thanet Building Society v Goddard* [1970] 3 All ER 954, [1970] 1 WLR 1544, CA.

9 *Leicester Permanent Building Society v Shearley* [1951] Ch 90, [1950] 2 All ER 738; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. See also *Barclays Bank Ltd v Kiley* [1961] 2 All ER 849, [1961] 1 WLR 1050, where the mortgagor was dead and no personal representatives had been appointed. See further *Bristol and West Building Society v Henning* [1985] 2 All ER 606, [1985] 1 WLR 778, CA; *Equity and Law Home Loans Ltd v Prestridge* [1992] 1 All ER 909, [1992] 1 WLR 137, CA.

10 *Alliance Building Society v Shave* [1952] Ch 581, [1952] 1 All ER 1033. See also PARA 550.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/548. Commencing the claim.

548. Commencing the claim.

The claim form and particulars of claim must be in the prescribed forms¹, and must be filed and served together². The particulars of claim must:

- 61 (1) identify the land to which the claim relates³;
- 62 (2) state whether the claim relates to residential property⁴;
- 63 (3) state the ground on which possession is claimed⁵;
- 64 (4) give full details about any mortgage⁶ or tenancy agreement⁷;
- 65 (5) give details of every person who, to the best of the claimant's knowledge, is in possession of the property⁸;
- 66 (6) describe the state of the mortgage account⁹;
- 67 (7) provide details of arrears of payment, where relevant¹⁰;
- 68 (8) state whether or not the loan which is secured by the mortgage is a regulated consumer credit agreement¹¹;
- 69 (9) set out, if appropriate, details that show that the property is not one in relation to which claims are required to be brought in the county court¹²;
- 70 (10) give relevant information about the defendant's circumstances¹³;
- 71 (11) give details of any tenancy entered into between the mortgagor and the mortgagee¹⁴; and
- 72 (12) state any previous steps which the claimant has taken to recover either the money secured by the mortgage or the mortgaged property¹⁵.

1 CPR 55.3(5); *Practice Direction--Possession Claims* PD 55 para 1.5. As to the prescribed claim form see *Practice Direction--Forms* PD 4 para 3.1, Table 1, Form N5; and as to the prescribed form of particulars of claim for mortgaged residential premises see *Practice Direction--Forms* PD 4 para 3.1, Table 1, Form N120. As to forms generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 14.

2 CPR 55.4.

3 *Practice Direction--Possession Claims* PD 55 para 2.1(1).

4 *Practice Direction--Possession Claims* PD 55 para 2.1(2). If the claim relates to residential property, the particulars of claim must additionally state whether a Class F land charge (ie a land charge which has been registered under the Matrimonial Homes Act 1967 s 2(7) (repealed), a notice under the Matrimonial Homes Act 1983 s 2(8) or s 8(3) (repealed) or a notice under the Family Law Act 1996 s 31(10): see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 286) has been registered, and where relevant on whose behalf, and if so, that the claimant will serve notice of the claim on the persons on whose behalf the charge is registered or the notice or caution entered: *Practice Direction--Possession Claims* PD 55 para 2.5(1). As to Class F land charges see the Land Charges Act 1972 s 2(7); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.

5 *Practice Direction--Possession Claims* PD 55 para 2.1(3).

6 As to the meaning of 'mortgage' see PARA 531 note 4. See also *Practice Direction (Chancery 1/91)* [1991] 3 All ER 768, [1991] 1 WLR 782, which provides: (1) that most building society mortgages incorporate standard mortgage conditions, and that in such cases a copy of the relevant conditions must also be exhibited; (2) that some standard forms of building society mortgage are so abbreviated that they give no particulars of the amount of the advance, the term of the loan, the rate of interest or the amount of the instalments, but that all these matters are defined in the mortgage conditions by reference to the offer letter and where the offer letter is thus in effect incorporated into the mortgage by reference, that also should be exhibited to the particulars; and (3) that many bank mortgages, although expressed in the usual bank 'all monies' form, are also qualified by an offer letter or other side letter, providing for repayment of the advance by instalments, and in these cases also the relevant letter should be exhibited to the particulars. As to building society mortgages generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2005 et seq.

7 *Practice Direction--Possession Claims* PD 55 para 2.1(4).

8 *Practice Direction--Possession Claims* PD 55 para 2.1(5).

9 See *Practice Direction--Possession Claims* PD 55 para 2.5(2). Particulars must include: (1) the amounts of the advance, any periodic repayment, and any payment of interest required to be made; (2) the amount which would have to be paid (after taking into account any adjustment for early settlement) in order to redeem the mortgage at a stated date not more than 14 days after the claim started, specifying the amount of solicitor's costs and administration charges which would be payable (in which regard see also *Nationwide Building Society v Bateman* [1978] 1 All ER 999, [1978] 1 WLR 394); (3) if the loan which is secured by the mortgage is a regulated consumer credit agreement (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79 et seq), the total amount outstanding under the terms of the mortgage; and (4) the rate of interest payable at the commencement of the mortgage, immediately before any arrears (see the text to note 10) accrued, and at the commencement of the proceedings: *Practice Direction--Possession Claims* PD 55 para 2.5(2)(a)-(d).

10 See *Practice Direction--Possession Claims* PD 55 para 2.5(3). If the claim is brought because of failure to pay the periodic payments when due, the particulars must: (1) state, in schedule form, the dates when the arrears arose, all amounts due, the dates and amounts of all payments made and a running total of the arrears; and (2) give details of any other payments required to be made as a term of the mortgage (eg for insurance premiums, legal costs, default interest, penalties, administrative or other charges), any other sums claimed, stating the nature and amount of each such charge, and whether any of these payments is in arrears and whether or not it is included in the amount of any periodic payment: *Practice Direction--Possession Claims* PD 55 para 2.5(3)(a), (b).

11 See *Practice Direction--Possession Claims* PD 55 para 2.5(4). If the loan is a regulated consumer credit agreement, particulars must specify the date on which any notice required by the Consumer Credit Act 1974 s 76 or s 87 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 234, 263) was given: *Practice Direction--Possession Claims* PD 55 para 2.5(4).

12 See *Practice Direction--Possession Claims* PD 55 para 2.5(5). Such properties are those to which the Consumer Credit Act 1974 s 141 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 288) applies: *Practice Direction--Possession Claims* PD 55 para 2.5(5).

13 See *Practice Direction--Possession Claims* PD 55 para 2.5(6). In particular, information must be given as to whether the defendant is in receipt of social security benefits and whether any payments are made on his behalf directly to the claimant under the Social Security Contributions and Benefits Act 1992: *Practice Direction--Possession Claims* PD 55 para 2.5(6).

14 See *Practice Direction--Possession Claims* PD 55 para 2.5(7). Such details must include details of any notices served: *Practice Direction--Possession Claims* PD 55 para 2.5(7).

15 See *Practice Direction--Possession Claims* PD 55 para 2.5(8). If such steps involved court proceedings, particulars must state the dates when the claim started and concluded and the dates and terms of any orders made: *Practice Direction--Possession Claims* PD 55 para 2.5(8).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/549. Hearing date, service and response.

549. Hearing date, service and response.

On issuing the claim form the court must fix a date for the hearing¹. The date must be not less than 28 days from the date of issue of the form², and the defendant must be served with the claim form and particulars of claim not less than 21 days before the hearing date³. An acknowledgment of service is not required⁴, although the defendant is as a rule required to file a defence within 14 days after service of the particulars⁵. In the case of a claim for possession of mortgaged residential premises the prescribed form of defence must be used⁶. Where the defendant does not file a defence within the time specified⁷, he may take part in any hearing but the court may take his failure to do so into account when deciding what order to make about costs⁸. The court cannot give judgment in default⁹ nor, in the case of residential premises, summary judgment¹⁰.

1 See CPR 55.5(1). As to the commencement of the claim see PARA 548.

2 CPR 55.5(3)(a). The standard period between the issue of the claim form and the hearing must be not more than eight weeks (CPR 55.5(3)(b)), although the court is empowered to extend or shorten the time for compliance with any rule (see CPR 3.1(2)(a); and **CIVIL PROCEDURE** vol 11 (2009) PARAS 247, 249; **CIVIL PROCEDURE** vol 12 (2009) PARA 1665). As to the exercise of the court's powers in this regard so far as relating to possession claims see *Practice Direction--Possession Claims* PD 55 para 3.

3 CPR 55.5(3)(c).

4 See CPR 55.7(1). CPR Pt 10 (which is concerned with acknowledgment of service: see **CIVIL PROCEDURE** vol 11 (2009) PARA 184 et seq) is accordingly inapplicable: CPR 55.7(1).

5 See CPR 15.4(1)(a), (2); and **CIVIL PROCEDURE** vol 11 (2009) PARA 201.

6 See CPR 55.3(5); *Practice Direction--Possession Claims* PD 55 para 1.5. As to the prescribed form see *Practice Direction--Forms* PD 4 para 3.1, Table 1, Form N11M. As to forms generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 14.

7 As specified in CPR 15.4: see **CIVIL PROCEDURE** vol 11 (2009) PARA 201.

8 CPR 55.7(3).

9 See CPR 55.7(4). CPR Pt 12 (which is concerned with default judgement: see **CIVIL PROCEDURE** vol 11 (2009) PARA 506 et seq) is accordingly inapplicable: see CPR 55.7(4).

10 See CPR 24.3(2)(a); and **CIVIL PROCEDURE** vol 11 (2009) PARA 524.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/550. Notice to occupiers.

550. Notice to occupiers.

Where a mortgagee¹ seeks possession of land which consists of or includes residential property², the claimant must, within five days of receiving notification of the date of the hearing by the court, send a notice to the property, addressed to 'the tenant or the occupier'³, which:

- 73 (1) states that a possession claim for the property has started⁴;
- 74 (2) shows the name and address of the claimant, the defendant and the court which issued the claim form⁵; and
- 75 (3) gives details of the hearing⁶.

Within the same period the claimant must also send a similar notice to the housing department of the local authority within which the property is located⁷ also stating the full address of the property⁸. The claimant must produce at the hearing a copy of the notices⁹ and evidence that they have been sent¹⁰.

1 As to the meaning of 'mortgagee' see PARA 531 note 4.

2 CPR 55.10(1).

3 CPR 55.10(2)(a).

4 CPR 55.10(3)(a). As to the meaning of 'possession claim' see PARA 531 note 3.

5 CPR 55.10(3)(b). As to the commencement of a claim see PARA 548.

6 CPR 55.10(3)(c). As to the hearing see PARA 551.

7 See CPR 55.10(2)(b). As to local housing authorities see **HOUSING** vol 22 (2006 Reissue) PARA 9.

8 See CPR 55.10(3A).

9 CPR 55.10(4)(a).

10 CPR 55.10(4)(b).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/551. The hearing.

551. The hearing.

Each party should, wherever possible, include all the evidence he wishes to present in his statement of case, verified by a statement of truth¹. Where relevant, the claimant's evidence should include the amount of any rent or mortgage arrears and interest on those arrears², and the defendant should give evidence of the amount of any outstanding social security or housing benefit payments relevant to rent or mortgage arrears³, as well as the status of pending social security claims and applications⁴. Where the claimant serves the claim form and particulars of claim⁵ he must produce at the hearing a certificate of service of those documents⁶; and he must also produce at the hearing a copy of the notices to tenants or occupiers and the local authority housing department and evidence that they have been sent⁷.

At the hearing⁸, the court may either decide the claim⁹ or give case management directions¹⁰. Unless either the claim is allocated to the fast track or the multi-track¹¹ or the court orders otherwise, any fact that needs to be proved by the evidence of witnesses at a hearing may be proved by evidence in writing¹². Provision is also made for the adjournment of a hearing in order that oral evidence can be given in circumstances where the maker of a witness statement does not attend a hearing and the other party disputes material evidence contained in his statement¹³.

1 *Practice Direction--Possession Claims* PD 55 para 5.1. As to statements of truth see **CIVIL PROCEDURE** vol 11 (2009) PARAS 613-616. Witness statements must be filed and served at least two days before the hearing: see CPR 55.8(4).

2 *Practice Direction--Possession Claims* PD 55 para 5.2. Such amounts should, if possible, be up to date to the date of the hearing (if necessary by specifying a daily rate of arrears and interest), although r 55.8(4) (see note 1) does not prevent such evidence being brought up to date orally or in writing on the day of the hearing if necessary: *Practice Direction--Possession Claims* PD 55 para 5.2.

3 *Practice Direction--Possession Claims* PD 55 para 5.3(1).

4 See *Practice Direction--Possession Claims* PD 55 para 5.3(2). Pursuant to this requirement, the defendant should give evidence of the status of any claims for social security or housing benefit about which a decision has not yet been made and any applications to appeal against or review a social security or housing benefit decision where that appeal or review has not yet concluded: see *Practice Direction--Possession Claims* PD 55 para 5.3(2).

5 See PARA 548.

6 CPR 55.8(6). CPR 6.17(2)(a) (certificate of service of claim form: see **CIVIL PROCEDURE** vol 11 (2009) PARA 154) does not apply in these circumstances: CPR 55.8(6).

7 See CPR 55.10(4)(a), (b); and PARA 550.

8 Is a hearing fixed in accordance with CPR 55.5(1) (see PARA 549) or at any adjournment of that hearing: see CPR 55.8(1).

9 CPR 55.8(1)(a).

10 CPR 55.8(1)(b). As to the giving of case management directions see **CIVIL PROCEDURE** vol 11 (2009) PARA 246 et seq. Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under CPR 55.8(1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated: CPR 55.8(2). As to the allocation of defended cases to case management tracks see **CIVIL PROCEDURE** vol 11 (2009) PARA 260 et seq.

11 As to the matters to which the court will have regard when it decides on allocation see CPR 55.9.

12 See CPR 55.8(3). As to the rules about witness evidence in this context see CPR 32.2(1), (2); and **CIVIL PROCEDURE** vol 11 (2009) PARA 750.

13 See *Practice Direction--Possession Claims* PD 55 para 5.4. As to adjournments see further PARA 552.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/552. Power to adjourn.

552. Power to adjourn.

Apart from the statutory power of adjournment in the absence of a witness¹ or where a dwelling house is involved², the court has no general jurisdiction to stand an undefended claim for possession over, whether on terms of making payments or paying arrears, unless the mortgagee agrees: it is not in principle legitimate for the court to order an adjournment designed to achieve a result which the law in force at the date of the hearing would not permit³. An adjournment may be ordered for a short time to afford the mortgagor a chance of paying off the mortgage in full, or otherwise satisfying the mortgagee, but this will not be done if there is no reasonable prospect of this occurring⁴. Thus the court has a limited jurisdiction to postpone the giving of possession to enable the property to be sold⁵.

1 See PARA 551.

2 See PARA 554 et seq.

3 *North British Housing Association Ltd v Matthews* [2004] EWCA Civ 1736, [2005] 2 All ER 667.

4 *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, [1962] 1 All ER 163; *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433, [1975] 1 WLR 1416, CA. It seems that the rules of court (ie CPR Sch 1 RSC Ord 45 r 11, Sch 2 CCR Ord 25 r 8) do not confer on the court any power to grant a stay of execution of an order of possession: *London Permanent Benefit Building Society v De Baer* [1969] 1 Ch 321, [1968] 1 All ER 372. As to the power to grant a stay of execution under CPR Sch 1 RSC Ord 45 r 11 and Sch 2 CCR Ord 25 r 8 see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1362-1362.

5 See *Cheltenham and Gloucester plc v Booker* (1996) 73 P & CR 412, 29 HLR 597, CA; and PARA 557.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/553. Restrictions on mortgagee's ability to obtain possession order.

553. Restrictions on mortgagee's ability to obtain possession order.

A mortgagee will be restrained from obtaining possession except when it is sought bona fide for the purpose of enforcing the security¹. Likewise, although the court has a power to make an order for possession against one of two joint mortgagors, it would not in general be appropriate to do so where it would be of no benefit to the mortgagee, especially where the mortgagors are husband and wife². The mortgagee's ability to enforce his security is also restricted by the

application for and existence of an administration order³, or a moratorium in advance of a voluntary arrangement⁴, in relation to a corporate or partnership mortgagor, and by an interim order obtained by an individual mortgagor who wishes to enter a voluntary arrangement⁵. The mortgagee needs leave to bring proceedings for possession against a company in liquidation⁶ or a bankrupt⁷. Any order for possession made in favour of a second mortgagee must respect the interest of the prior mortgagee, including his interests as landlord⁸.

1 *Quennell v Maltby* [1979] 1 All ER 568 at 571, [1979] 1 WLR 318 at 322, CA, per Lord Denning MR; *Sadiq v Hussain* [1997] NPC 19, CA. See also PARA 392.

2 *Albany Home Loans Ltd v Massey* [1997] 2 All ER 609, [1997] 2 FLR 305, CA.

3 See PARA 517. See also *Bristol Airport plc v Powdrill* [1990] Ch 744, [1990] 2 All ER 493, CA; *Re Atlantic Computer Systems plc* [1992] Ch 505, [1992] 1 All ER 476, CA.

4 See PARA 519.

5 See PARA 523.

6 See PARA 520.

7 See PARA 525.

8 See *Berkshire Capital Funding Ltd v Street* (1999) Times, 27 May, CA. As to the leasing power of a mortgagee see PARA 426.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/554. Power to suspend or adjourn possession order in the case of a dwelling house.

554. Power to suspend or adjourn possession order in the case of a dwelling house.

Where a mortgagee under a mortgage¹ of land which consists of or includes a dwelling house² brings proceedings in which he claims possession of the mortgaged property, not being a claim for foreclosure³ in which a claim for possession of the mortgaged property is also made, the court may adjourn the proceedings⁴ or, on giving judgment or making an order for delivery of possession of the mortgaged property or at any time before the execution of the judgment or order, may stay or suspend execution of the judgment or order, or postpone the date for delivery of possession⁵, for such period or periods as it thinks reasonable⁶. The court may exercise these powers only where it appears to it that in the event of its exercising them the mortgagor is likely to be able within a reasonable period to pay any sums due⁷ under the mortgage or to remedy a default⁸ consisting of a breach⁹ of any other obligation arising under or by virtue of the mortgage¹⁰; and it may also suspend any order it makes in order to enable the mortgagor to effect a sale¹¹. Repeat applications may be made but a judge may reject a repeat application if he considers that it amounts to an abuse of process¹².

The county court cannot set aside or suspend a warrant for possession of a dwelling house let under a secure tenancy after execution unless either (1) the possession order on which it was issued was itself set aside; (2) the warrant had been obtained by fraud; or (3) there had been an abuse of process or oppression in its execution¹³.

1 Le other than a mortgage securing an agreement which is a regulated agreement within the meaning of the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79): Administration of Justice Act 1970 s 38A (added by the Consumer Credit Act 1974 s 192(3)(a), Sch 4 Pt 1 para 30). For these purposes, 'mortgage' includes a charge; and 'mortgagor' and 'mortgagee' are to be construed accordingly and include any person deriving title under the original mortgagor or mortgagee: Administration of Justice Act 1970 s 39(1). A

statutory tenant of a mortgagor is not a 'person deriving title under the original mortgagor': *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA.

2 'Dwelling house' includes any building or part of a building which is used as a dwelling: Administration of Justice Act 1970 s 39(1). The fact that part of the premises comprised in a dwelling house is used as a shop or office or for business, trade or professional purposes does not prevent the dwelling house from being a dwelling house for these purposes: s 39(2). Premises consist of or include a dwelling house for these purposes if they include such a house on the date when the mortgagee brings the claim for possession: see *Royal Bank of Scotland plc v Miller* [2001] EWCA Civ 344, [2002] QB 255, [2001] 3 WLR 523.

3 As to foreclosure see PARA 566 et seq.

4 See the Administration of Justice Act 1970 s 36(1), (2)(a). Any such adjournment, stay, suspension or postponement (see the text to notes 5-6) may be made subject to such conditions with regard to the payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit: s 36(3). The court may from time to time vary or revoke any condition imposed: s 36(4).

5 Administration of Justice Act 1970 s 36(2)(b). See also note 4. The court has no jurisdiction once an order or judgment has been executed or once the mortgagee has extinguished the mortgagor's equity: *National and Provincial Building Society v Ahmed* [1995] 2 EGLR 127, [1995] NPC 88, CA.

6 Administration of Justice Act 1970 s 36(2). Execution of an order may not be suspended for an indefinite period: *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433, [1975] 1 WLR 1416, CA; *Bristol and West Building Society v Ellis and Ellis* (1996) 73 P & CR 158, 29 HLR 282, CA. As to the principles applicable on the determination of a reasonable period see PARAS 556-557.

7 The court can order its own inquiry as to the amounts due: *Shirlstar Container Transport Ltd v Re-Enforce Trading Co Ltd* [1990] NPC 76, CA.

8 This provision does not apply only to breaches of obligations affecting the mortgagee's security; a breach consisting of an unlawful letting by the mortgagor without the mortgagee's consent can only be remedied by the departure of those tenants: see *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA.

9 This provision also applies where there is no default: *Western Bank Ltd v Schindler* [1977] Ch 1, [1976] 2 All ER 393, CA.

10 See the Administration of Justice Act 1970 s 36(1).

11 See PARAS 557-558.

12 *Abbey National Mortgages plc v Bernard* (1995) 71 P & CR 257, [1995] NPC 118, CA.

13 *Cheltenham and Gloucester Building Society v Obi* (1994) 28 HLR 22, CA; *Mortgage Express v Da Rocha-Afodu* [2007] EWHC 297 (QB), [2007] All ER (D) 276 (Feb).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/555. Extension of powers where payment is deferred with provision for earlier payment in certain circumstances.

555. Extension of powers where payment is deferred with provision for earlier payment in certain circumstances.

Where by a mortgage¹ of land which consists of or includes a dwelling house², or by any agreement between the mortgagee and the mortgagor³ under such a mortgage, the mortgagor may pay the principal sum secured by instalments or otherwise defer⁴ payment in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for the purposes of its powers to delay giving possession⁵ the court may treat as due under the mortgage on account of the principal sum secured and interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment⁶. The court may not exercise any of its powers unless it appears to it not only that the mortgagor is

likely to be able within a reasonable period to pay the amounts he would have expected to be required to pay if there had been no provision for earlier payment, together with interest, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and the interest on it if there had been no provision for earlier payment⁷.

Where, pursuant to these provisions, a court could, in proceedings in which the mortgagee only claimed possession of the mortgaged property, treat as due under the mortgage only such amounts as the mortgagor would have expected to pay had there been no provision for earlier payment, and the mortgagee brings proceedings for foreclosure⁸ (with or without also claiming possession of the property), the court may exercise its statutory powers as if the mortgagee were only claiming possession of the mortgaged property, except that the court's power to stay or suspend execution of a judgment or order for delivery or to postpone the date for delivery of possession may only be exercised in relation to any claim for possession⁹.

1 As to the meaning of 'mortgage' see PARA 554 note 1; definition applied by the Administration of Justice Act 1973 s 8(4).

2 As to the meaning of 'dwelling house' see PARA 554 note 2; definition applied by the Administration of Justice Act 1973 s 8(4).

3 As to the meanings of 'mortgagee' and 'mortgagor' see PARA 554 note 1; definition applied by the Administration of Justice Act 1973 s 8(4).

4 See *Habib Bank Ltd v Taylor* [1982] 3 All ER 561, [1982] 1 WLR 1218, CA, where it was held that the Administration of Justice Act 1973 s 8 presupposes an existing liability to pay which is deferred by the terms of the mortgage or covenant, and accordingly, it was held that s 8 does not apply in a case where demand is a precondition to liability such as on a running account between banker and customer. See also *Rees Investments Ltd v Groves* [2002] 1 P & CR D15. However, the provision applies in the case of a mortgage financed by an endowment policy where there is no obligation to repay the capital until the end of the term (*Bank of Scotland v Grimes* [1985] QB 1179, [1985] 2 All ER 254, CA) and in the case of a mortgage repayable at the end of a fixed period (*Royal Bank of Scotland plc v Miller* [2001] EWCA Civ 344, [2002] QB 255, [2001] 3 WLR 523).

5 As to the court's powers under the Administration of Justice Act 1970 s 36: see PARA 554. As to exercising suspensory powers see PARA 558.

6 Administration of Justice Act 1973 s 8(1). This reversed the decision in *Halifax Building Society v Clark* [1973] Ch 307, [1973] 2 All ER 33. See also *Centrax Trustees Ltd v Ross* [1979] 2 All ER 952.

7 Administration of Justice Act 1973 s 8(2).

8 As to foreclosure see PARA 566 et seq.

9 See the Administration of Justice Act 1973 s 8(3).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/556. Mortgagor must be likely to be able to pay sums due within a reasonable period.

556. Mortgagor must be likely to be able to pay sums due within a reasonable period.

The starting point for assessing what is a reasonable period¹ is the remaining term of the mortgage². It is not proper for the court to make an order for payments which the mortgagor cannot afford and has no foreseeable prospects of being able to afford within a reasonable time, and neither is it proper for the court to make an order for payments which the mortgagor can afford if those will not be enough to pay off the arrears within a reasonable period and also cover the current instalments³. Where the mortgagor asserts a cross-claim, the court should

consider whether its existence and prospects of success could be regarded as enabling the sums due to be paid within a reasonable time⁴. The court has a discretion as to whether or not to require sworn evidence in deciding upon the debtor's ability to pay off the arrears in a reasonable time⁵.

1 le for the purposes of the Administration of Justice Act 1970 s 36: see PARA 554.

2 See *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449, [1996] 1 WLR 343, CA (disapproving the former practice of the courts of imposing a shorter period of two or more years). See also *Western Bank Ltd v Schindler* [1977] Ch 1, [1976] 2 All ER 393, CA.

3 *First National Bank v Syed* [1991] 2 All ER 250, [1991] CCLR 37, CA; *Abbey National Mortgages plc v Bernard* (1995) 71 P & CR 257, [1995] NPC 118, CA. See also *Town and Country Building Society v Julien* (1991) 24 HLR 312, CA.

4 *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA; *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA. Cf *Household Mortgage Corp plc v Pringle* (1997) 30 HLR 250, CA, where the court disregarded a cross-claim for unliquidated damages in considering what sum was due for the purpose of exercising the statutory discretion to suspend a judgment for possession. As to the rule that the existence of a counterclaim does not affect the mortgagee's right to possession see PARA 405.

5 *Cheltenham and Gloucester Building Society v Grant* (1994) 26 HLR 703, CA. The court is entitled to infer from the mortgagor's poor payment record that he is unlikely to pay: *Abbey National v Mewton* [1995] CLY 3598, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/557. Court may suspend order to allow mortgagor to effect a sale.

557. Court may suspend order to allow mortgagor to effect a sale.

The court may also suspend an order for possession¹ where a mortgagor's only prospect of repaying the entire mortgage loan and accrued interest is from a sale of the property², if such a sale would be more readily achieved where the dwelling house is occupied rather than repossessed³. In such cases the relevant factors will be the extent to which the mortgage debt arrears are secured by the value of the property and the effect of the passing of time on that security⁴. There should be evidence before the court of the likelihood of a proposed sale and the period within which such a sale is likely to be achieved⁵. There is no rule of law to the effect that an order for possession is to be adjourned or suspended only if a sale would take place within a short period of time, and in each case the question of what is a reasonable period is one for the court⁶. The court cannot suspend an order for possession where the proceeds of such a sale would be insufficient to discharge the mortgage debt unless other funds would be available to make up the shortfall⁷. The court also has power to defer possession for a short time to enable the mortgagee to sell the property while allowing the mortgagor to remain in occupation pending completion, although such orders will be rare⁸.

1 le an order made under the Administration of Justice Act 1970 s 36(2): see PARA 554. See also PARA 555. As to exercising suspensory powers see PARA 558.

2 *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433, [1975] 1 WLR 1416, CA; *Citibank Trust Ltd v Ayivor* [1987] 3 All ER 241, [1987] 1 WLR 1157; *National and Provincial Building Society v Lloyd* [1996] 1 All ER 630, 28 HLR 459, CA. As to the jurisdiction of the court to make an order for sale see the Law of Property Act 1925 s 91(2); and PARA 616 et seq.

3 *Target Home Loans Ltd v Clothier* [1994] 1 All ER 439, (1992) 25 HLR 48, CA.

4 *Bristol and West Building Society v Ellis* (1996) 73 P & CR 158, 29 HLR 282, CA.

5 *National and Provincial Building Society v Lloyd* [1996] 1 All ER 630, 28 HLR 459, CA; *Bristol and West Building Society v Ellis* (1996) 73 P & CR 158, 29 HLR 282, CA; *Cheltenham and Gloucester Building Society v Johnson* (1996) 73 P & CR 293, 28 HLR 885, CA.

6 *National and Provincial Building Society v Lloyd* [1996] 1 All ER 630, 28 HLR 459, CA.

7 *Cheltenham and Gloucester plc v Krausz* [1997] 1 All ER 21, [1997] 1 WLR 1558, CA. See also PARA 617.

8 *Cheltenham and Gloucester plc v Booker* (1996) 73 P & CR 412, 29 HLR 634, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/558. Power to suspend order for money judgment must be exercised consistently with power to suspend possession order.

558. Power to suspend order for money judgment must be exercised consistently with power to suspend possession order.

The discretion to suspend an order for payment on proceedings for money judgment¹ should be exercised consistently with the exercise of discretion to suspend or stay an order or judgment for possession², and therefore, if the court suspends an order for possession it should in the normal course of events also suspend execution of an order for money judgment on the same terms as and in line with the suspension of the possession order³.

1 *See* under the County Courts Act 1984 s 71(2): see **CIVIL PROCEDURE** vol 12 (2009) PARA 1229.

2 *See* under the Administration of Justice Act 1970 s 36 (see PARA 554) and the Administration of Justice Act 1973 s 8 (see PARA 555).

3 *Cheltenham and Gloucester Building Society v Grattidge and Grattidge* (1993) 25 HLR 454, CA. There may be instances where special circumstances justify a departure from the usual practice: *Cheltenham and Gloucester Building Society v Johnson* (1997) 73 P & CR 293, 28 HLR 885, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(5) PROCEEDINGS FOR POSSESSION/559. Form of order for possession.

559. Form of order for possession.

There is a prescribed form of order for possession¹, which requires delivery of possession² by a specified time and date³. There is also a prescribed form for suspended orders for possession of residential mortgaged property⁴.

In the High Court a writ of possession issues⁵ as of right on proof of service and non-compliance⁶. If the mortgagor gets back into possession after the mortgagee has regained possession, a writ of restitution or, more rarely, committal for contempt should be sought⁷.

In the county court, save where permission is required⁸, a warrant of possession may be issued on the filing by the mortgagee of a request certifying that the land has not been vacated in accordance with the judgment or order⁹ and, if a suspended order was made, certifying the amount of money remaining due and that the whole or part of any instalment due remains unpaid¹⁰.

Where two or more mortgagors are in occupation an order for possession should not be made against one of them alone: the proceedings against the one mortgagor should be adjourned

with permission to restore if the other mortgagor leaves the property or an order for possession is made against that other mortgagor¹¹.

1 See CPR Pt 4; *Practice Direction--Forms* PD 4 para 3.1, Table, Form N26. As to forms generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 14.

2 This means vacant possession: see *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428, [1957] 1 WLR 813.

3 See CPR 2.9; and **CIVIL PROCEDURE** vol 11 (2009) PARA 89. See also *Barclays Bank Ltd v Bird* [1954] Ch 274 at 282, [1954] 1 All ER 449 at 453 per Harman J; *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 All ER 35; *London Permanent Benefit Building Society v De Baer* [1969] 1 Ch 321, [1968] 1 All ER 372.

4 See CPR Pt 4; *Practice Direction--Forms* PD 4 para 3.1, Table, Form N31.

5 See under CPR Sch 1 RSC Ord 45 r 3: see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1247, 1274.

6 Permission is required where six or more years have elapsed since the date of the judgment or order or any change has taken place, whether by death or otherwise, in the parties entitled to enforce the judgment or liable to have it enforced against them: see CPR Sch 1 RSC Ord 46 r 2; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1274.

7 See *Alliance Building Society v Austen* [1951] 2 All ER 1068; *Abbey National Building Society v Morris* (1978) 128 NLJ 999.

8 Permission to issue a warrant of possession is required only where six or more years have elapsed since the date of the judgment or order or any change has taken place, whether by death or otherwise, in the parties entitled to enforce the judgment or liable to have it enforced against them: see CPR Sch 2 CCR Ord 26 r 5(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1285.

9 See CPR Sch 2 CCR Ord 26 r 17(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1292.

10 See CPR Sch 2 CCR Ord 26 r 17(3A); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1292.

11 *Albany Home Loans v Massey* [1997] 2 All ER 609, 73 P & CR 509, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(6) APPOINTMENT OF RECEIVER BY THE COURT/560. Object of appointment.

(6) APPOINTMENT OF RECEIVER BY THE COURT

560. Object of appointment.

Where there has been a breach of the mortgagor's obligations, or where, without such actual breach, the security is in jeopardy¹, the mortgagee may obtain an order for the appointment of a receiver by the court, provided the circumstances render it just and convenient². However, because mortgagees have statutory powers to appoint a receiver³, it is not usually necessary for a mortgagee to apply to the court for such an order⁴.

It is sufficient that interest is in arrear⁵ even though principal is not yet payable⁶. In the case of a floating security where the breach relied on is non-payment of principal, it is sufficient if it is due before the application, even if it was not due when the claim form was issued⁷. The appointment is made with a view to preserving the property if it is in danger or, by intercepting the income, to provide a fund for payment of the mortgage; and it is made either as a step in proceedings brought to enforce the security, or in proceedings having the appointment of a receiver as the sole object⁸. A receiver will not be appointed to sell a business carried on at the mortgaged property, but not included in the mortgage⁹.

1 *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158; *Edwards v Standard Rolling Stock Syndicate* [1893] 1 Ch 574; *Re London Pressed Hinge Co Ltd, Campbell v London Pressed Hinge Co Ltd* [1905] 1 Ch 576. See also *Higginson v German Athenaeum Ltd* (1916) 32 TLR 277, where the property was in effect derelict.

2 See the Senior Courts Act 1981 s 37(1); the County Courts Act 1984 s 38(1); CPR Pt 69; and **RECEIVERS** vol 39(2) (Reissue) PARAS 313, 315. See also *Re Prytherch, Prytherch v Williams* (1889) 42 ChD 590. As to the appointment of receivers by the court see **RECEIVERS** vol 39(2) (Reissue) PARA 309 et seq. As to the appointment of receivers of the assets of companies see **COMPANIES** vol 15 (2009) PARA 1340. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

3 See under the Law of Property Act 1925 ss 101(1)(iii), 109: see PARA 476.

4 See eg *Bank of Credit and Commerce International SA v BRS Kumar Bros Ltd* [1994] 1 BCLC 211.

5 *Strong v Carlyle Press* [1893] 1 Ch 268, CA.

6 *Burrowes v Molloy* (1845) 2 Jo & Lat 521; *Bissill v Bradford Tramways Co* [1891] WN 51.

7 *Re Carshalton Park Estate Ltd, Graham v Carshalton Park Estate Ltd, Turnell v Carshalton Park Estate Ltd* [1908] 2 Ch 62.

8 As to the circumstances in which a receiver will be appointed, the stage of the proceedings at which the application may be made, and generally as to receivers appointed by the court and their duties and liabilities see **RECEIVERS** vol 39(2) (Reissue) PARA 301 et seq. As to the appointment of receivers on behalf of mortgagees and debenture stockholders of companies established for public purposes see **COMPANIES** vol 15 (2009) PARA 1333 et seq. On its true construction, a security may give the creditor only the right to have a receiver appointed: see *Taylor v Emerson* (1843) 6 I Eq R 224.

9 *Britannia Building Society v Crammer* [1997] BPIR 596.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(6) APPOINTMENT OF RECEIVER BY THE COURT/561. On whose application and when appointed.

561. On whose application and when appointed.

It is the practice of the court to appoint a receiver on the application of a legal as well as of an equitable mortgagee¹. Where proceedings are pending, an appointment by the court is the proper procedure, notwithstanding that the mortgagee has power to appoint a receiver himself². The appointment will not be made after judgment for foreclosure absolute³.

1 *Pease v Fletcher* (1875) 1 ChD 273; *Truman & Co v Redgrave* (1881) 18 ChD 547; *Tillett v Nixon* (1883) 25 ChD 238; *Duke of Grafton v Taylor, Earl Manvers v Taylor* (1891) 7 TLR 588. See also *Re Pope* (1886) 17 QBD 743 at 749, CA; *Re Whiteley, Whiteley v Learoyd* (1887) 56 LT 846 at 847. Cf *Anglo-Italian Bank v Davies* (1878) 9 ChD 275 at 286, CA. The practice is certainly applicable where the mortgage includes both legal estates and equitable interests: *Pease v Fletcher* above. As to legal mortgages see PARA 104; and as to equitable mortgages see PARA 105.

2 *Tillett v Nixon* (1883) 25 ChD 238. See also *Bord v Tollemache* (1862) 1 New Rep 177. A receiver already appointed is not displaced by the commencement of foreclosure proceedings: see PARA 566 et seq.

3 *Wills v Luff* (1888) 38 ChD 197 (on the ground that the proceedings are at an end, although a conveyance of the property has still to be settled). As to foreclosure absolute see PARA 603 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(6) APPOINTMENT OF RECEIVER BY THE COURT/562. Registration of appointment of receiver.

562. Registration of appointment of receiver.

An order for the appointment of a receiver is registrable as a land charge in the case of unregistered land¹, and is capable of being protected by a restriction in the case of registered land².

In the case of an order for the appointment of a receiver or manager of company property, the person obtaining the order must give notice to the registrar of companies within seven days of its being made and the registrar will enter that fact on the register of charges³.

1 See the Land Charges Act 1972 s 6(1)(b); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 654. See also *Clayhope Properties Ltd v Evans* [1986] 2 All ER 795, [1996] 1 WLR 1223, CA.

2 See the Land Charges Act 1972 s 6(1)(b); the Land Registration Act 2002 ss 42, 43; **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 1008-1009.

3 See the Companies Act 2006 s 871; and **COMPANIES** vol 15 (2009) PARA 1292.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(6) APPOINTMENT OF RECEIVER BY THE COURT/563. Functions of receiver and appointment of receiver and manager.

563. Functions of receiver and appointment of receiver and manager.

A receiver's functions are limited to receipt of income and payment of ascertained outgoings¹. He has no general powers of management², but where the mortgage, expressly or by implication, includes a business³, a receiver and manager may be appointed⁴. It seems that if the business is not included in the security the court has no jurisdiction to appoint a manager⁵. An appointment of a manager may be made even if this is with a view to the sale of the business as a going concern⁶. Consequently, if the security is a public undertaking which the receiver has no power to sell, a manager will not be appointed⁷. A receiver and manager will, if necessary, be appointed of land⁸.

1 See **RECEIVERS** vol 39(2) (Reissue) PARA 399 et seq.

2 *Re Manchester and Milford Rly Co, ex p Cambrian Rly Co* (1880) 14 ChD 645 at 653, CA.

3 See *Truman & Co v Redgrave* (1881) 18 ChD 547 (mortgage to brewers of licensed premises, together with the trade fixtures, goodwill and licences); *Taylor v Soper* (1890) 62 LT 828 (where the brewers' mortgage was in similar terms); *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158 (debenture of a trading company charging its undertaking and all its property). See also *Chaplin v Young* (1862) 6 LT 97 (mortgage of a newspaper); *Peek v Trinsmaran Iron Co* (1876) 2 ChD 115 (debentures charging real and personal estate, assets, plant, machinery and effects of mining company); *Makins v Percy Ibotson & Sons* [1891] 1 Ch 133 (debentures of trading company charging all property including uncalled capital); *Campbell v Lloyd's, Barnett's and Bosanquet's Bank Ltd* [1891] 1 Ch 136n (mortgage of freehold and leasehold collieries but not, in terms, of colliery business); *Edwards v Standard Rolling Stock Syndicate* [1893] 1 Ch 574 (mortgage of whole of company's undertaking); *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA (mortgage of land, mines, beds, and seams of coal, and all buildings and erections, fixed motive power, plant etc); *Fairfield Shipbuilding and Engineering Co Ltd v London and East Coast Express Steamship Co Ltd* [1895] WN 64 (statutory mortgage of a ship); *Re A Boynton Ltd, Hoffmann v A Boynton Ltd* [1910] 1 Ch 519 at 520 (debenture charging all the property and assets of an hotel company); *Re Leas Hotel Co, Salter v Leas*

Hotel Co [1902] 1 Ch 332 (debenture charging all the buildings, property, stock-in-trade, furniture, chattels and effects of a hotel company).

4 *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629, CA. See also PARA 198. See further **RECEIVERS** vol 39(2) (Reissue) PARA 482 et seq.

5 *Whitley v Challis* [1892] 1 Ch 64, CA; *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158; *Re Leas Hotel Co, Salter v Leas Hotel Co* [1902] 1 Ch 332. See also *Waters v Taylor* (1808) 15 Ves 10, where the appointment of a manager was refused partly on the ground that the plaintiff in his capacity as mortgagee was suing for foreclosure only, and not for sale. As to foreclosure see PARA 566 et seq.

6 *Gardner v London, Chatham and Dover Rly Co (No 1), Drawbridge v London, Chatham and Dover Rly Co, Gardner v London, Chatham and Dover Rly Co (No 2), Imperial Mercantile Credit Association v London, Chatham and Dover Rly Co* (1867) 2 Ch App 201 at 212; *Whitley v Challis* [1892] 1 Ch 64 at 69-70, CA; *Securities and Properties Corp Ltd v Brighton Alhambra Ltd* (1893) 62 LJCh 566; *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158 at 162; *Re Newdigate Colliery Ltd, Newdigate v Newdigate Colliery Ltd* [1912] 1 Ch 468 at 472, CA. See also PARA 424.

7 *Marshall v South Staffordshire Tramways Co* [1895] 2 Ch 36, CA.

8 *Duke of Grafton v Taylor, Earl Manvers v Taylor* (1891) 7 TLR 588. It has been said not to be the practice of the courts in appointing receivers and managers of mortgaged hereditaments to make any order for delivery of possession of the land, as distinct from the possession of stock-in-trade and effects; the ground of this practice was stated to be that possession of mortgaged premises would not be ordered in a mortgage action until after foreclosure absolute: *National Provincial Bank of England Ltd v United Electric Theatres Ltd* (1916) as reported in 85 LJCh 106 at 113. See, however, the cases cited in PARA 565 note 3. As to foreclosure absolute see PARA 603 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(6) APPOINTMENT OF RECEIVER BY THE COURT/564. Appointment on behalf of subsequent mortgagee or persons equitably interested.

564. Appointment on behalf of subsequent mortgagee or persons equitably interested.

The appointment of a receiver at the instance of a subsequent incumbrancer is without prejudice to the rights of prior incumbrancers¹. Therefore, if a prior mortgagee whose existence is known is not in possession, the appointment is made subject to his right to take possession², and, accordingly, the first mortgagee can take possession without the permission of the court³, although formerly it was considered that permission was required⁴, and application for permission was usually made⁵. Permission is, however, necessary where there has been no express reservation of the mortgagee's rights in the order⁶. If a prior mortgagee is in possession, an appointment of a receiver at the instance of a subsequent incumbrancer will not be made so long as anything remains due to the prior mortgagee, unless he refuses to accept a tender of what he alleges to be due⁷. To avoid the appointment being made he must claim that something is due, though he need not claim a specific sum⁸. If the prior mortgagee's accounts are in such a state that he cannot claim that anything is due, a receiver will be appointed⁹. If a receiver has been appointed in the absence of a prior incumbrancer, he will be discharged and the prior incumbrancer, although only equitable, let into possession¹⁰; and where other incumbrances are known to exist, the appointment may be accompanied by an inquiry as to the priorities of the several incumbrancers¹¹. A receiver will be appointed against the owner of the legal estate who refuses to satisfy equitable interests¹², or if there is a strong prima facie case for setting the conveyance to him aside¹³; but not otherwise, unless the rents and profits are in danger¹⁴.

1 *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 137, 165; *Berney v Sewell* (1820) 1 Jac & W 647.

2 *Bryan v Cormick* (1788) 1 Cox Eq Cas 422; *Dalmer v Dashwood* (1793) 2 Cox Eq Cas 378 at 383; *Davis v Duke of Marlborough* (1819) 2 Swan 108; *Berney v Sewell* (1820) 1 Jac & W 647; *Tanfield v Irvine* (1826) 2 Russ 149 at 151; *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507 at 511, CA; *Cadogan v Lyric Theatre Ltd* [1894] 3 Ch 338, CA. As to the mortgagee's right to possession see PARA 402 et seq.

3 *Underhay v Read* (1887) 20 QBD 209 at 219, CA; *Engel v South Metropolitan Brewing and Bottling Co* [1891] WN 31. See also PARA 409.

4 See *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 138n.

5 *Preston v Tunbridge Wells Opera House Ltd* [1903] 2 Ch 323; *Re Metropolitan Amalgamated Estates Ltd, Fairweather v Metropolitan Amalgamated Estates Ltd* [1912] 2 Ch 497, 502.

6 *Re Henry Pound, Son and Hutchins* (1889) 42 ChD 402 at 422, CA.

7 *Berney v Sewell* (1820) 1 Jac & W 647.

8 *Chambers v Goldwin* (1804) 9 Ves 254; *Quarrell v Beckford* (1807) 13 Ves 377 at 378; *Rowe v Wood* (1822) 2 Jac & W 553 at 557.

9 *Codrington v Parker* (1810) 16 Ves 469; *Hiles v Moore* (1852) 15 Beav 175.

10 *Langton v Langton* (1855) 7 De GM & G 30. A first mortgagee is entitled to back rents paid to a receiver after service of notice of motion for his discharge: *Preston v Tunbridge Wells Opera House Ltd* [1903] 2 Ch 323.

11 *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 138; *Metcalfe v Archbishop of York* (1835) 6 Sim 224 (affd (1836) 1 My & Cr 547); *Hiles v Moore* (1852) 15 Beav 175 at 179. As to the priority of mortgages see PARA 258 et seq.

12 *Pritchard v Fleetwood* (1815) 1 Mer 54. See also **RECEIVERS** vol 39(2) (Reissue) PARA 341.

13 *Hugonin v Baseley* (1806) 13 Ves 105; *Stilwell v Wilkins* (1821) Jac 280; *George v Evans* (1840) 4 Y & C Ex 211. Fraud must be clearly proved: see *Lloyd v Passingham* (1809) 16 Ves 59 at 70.

14 *Lancashire v Lancashire* (1845) 9 Beav 120 at 129.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(6) APPOINTMENT OF RECEIVER BY THE COURT/565. Position of tenants or mortgagor in possession.

565. Position of tenants or mortgagor in possession.

On a receiver of real or leasehold property being appointed, the tenants are directed to attorn and pay their rents in arrear and becoming due to him¹. If it does not appear in what right possession is held, application should be made that the person in possession should attorn, and then he must explain his possession to the court². If the mortgagor is in possession, prima facie the mortgagee is entitled to an order that the mortgagor deliver up possession of the premises to the receiver³, but the matter is within the discretion of the court, which may give the mortgagor an opportunity to attorn tenant to the mortgagee⁴. If the mortgagor is ordered to attorn, the liability to pay rent commences from the date of the order⁵. If there is no order for the mortgagor in occupation to give up possession or to attorn, he must pay rent from the date of demand by the receiver⁶.

1 *Davis v Duke of Marlborough* (1819) 2 Swan 108 at 116; *Hawkes v Holland* [1881] WN 128, CA. See also **RECEIVERS** vol 39(2) (Reissue) PARA 375 et seq.

2 *Reid v Middleton* (1823) Turn & R 455. Cf *Randfield v Randfield* (1859) 7 WR 651.

3 *Pratchett v Drew* [1924] 1 Ch 280, following *Hawkes v Holland* [1881] WN 128, CA, and *Edgell v Wilson* [1893] WN 145, and distinguishing as due to special circumstances *Taylor v Soper* (1890) 62 LT 828 (where it

was held that an order for possession could not be granted until judgment in foreclosure proceedings). As to foreclosure see PARA 566 et seq.

4 *Pratchett v Drew* [1924] 1 Ch 280 at 286. See also *Re Burchnall, Walker v Lacey* (1893) 38 Sol Jo 59.

5 *Lloyd v Mason* (1837) 2 My & Cr 487; *Re Burchnall, Walker v Lacey* (1893) 38 Sol Jo 59.

6 *Yorkshire Banking Co v Mullan* (1887) 35 ChD 125.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(i) Nature of Right to Foreclose/566. Effect of foreclosure order on legal mortgage.

(7) FORECLOSURE

(i) Nature of Right to Foreclose

566. Effect of foreclosure order on legal mortgage.

Under a legal mortgage by demise¹ the mortgagee becomes absolute owner of the mortgage term at law as soon as the day fixed for redemption is past, and the equity of redemption arises by virtue of the interference of equity to allow the mortgagor to redeem, notwithstanding that his legal right of redemption is gone². The effect is the same in the case of a legal mortgage created by way of legal charge for, although there is no mortgage term, the mortgagee's rights are enforced in the same way as if a mortgage term had been created, and the legal right to redeem and so to terminate the legal charge lasts until the day fixed for payment³. By foreclosure a mortgagee may make his ownership effectual, for, on his bringing proceedings for foreclosure, a further day is appointed for payment, and if the money is not then paid the court leaves the parties to their legal rights⁴.

There is no foreclosure, however, against the Crown⁵; the established practice is to direct a sale and rely on the Crown conveying⁶. Where it appears that the Crown has no interest, the Attorney General is dismissed from the proceedings⁷.

By permitting foreclosure, the court removes the stop it has itself put on⁸; the property belongs to the mortgagee absolutely⁹, not only for the mortgage term, but also for the mortgagor's whole interest so that, if he has the fee simple, the order absolute operates to vest the fee simple in the mortgagee and the mortgage term is merged in the fee simple; the vesting in the mortgagee is subject to any prior legal mortgage, but any subsequent legal mortgage is extinguished¹⁰. In the case of a legal leasehold mortgage, the nominal reversion vests in the mortgagee, and the mortgage sub-term is merged¹¹.

1 See PARAS 190-191.

2 See PARAS 107, 302 et seq.

3 See PARA 221.

4 *Sampson v Pattison* (1842) 1 Hare 533 at 536. As to foreclosure under a building society mortgage see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2031. As to land abroad see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 396 et seq; **EQUITY** vol 16(2) (Reissue) PARA 551.

5 Formerly the order was that the mortgagee should hold and enjoy the mortgaged property until the Crown thought fit to redeem: *Lutwich's Case* (circa 1729), cited in 2 Atk at 223; *Hodge v A-G* (1839) 3 Y & C Ex 342. A sale might be ordered if the Crown had only an equitable interest, but not where the legal estate was vested in the Crown, as the court could not compel the Crown to convey: *Hodge v A-G* above.

6 *Hancock v A-G* (1864) 10 Jur NS 557; *Bartlett v Rees* (1871) LR 12 Eq 395. See also *Rogers v Maule* (1841) 1 Y & C Ch Cas 4; *Scott v Robarts* (1856) 4 WR 499. Cf *Prescott v Tyler* (1837) 1 Jur 470; *Prescott v Tyler* (1838) 2 Jur 870, where the Crown had no legal estate, and declined either to claim or disclaim.

7 *Prescott v Tyler* (1837) 1 Jur 470.

8 *Carter v Wake* (1877) 4 ChD 605.

9 *Silberschildt v Schiott* (1814) 3 Ves & B 45 at 49; *Le Gros v Cockerell* (1832) 5 Sim 384 at 389.

10 Law of Property Act 1925 s 88(2). Formerly, the effect of the order for foreclosure was, when the mortgagee took a legal fee simple estate, to vest a new title in the mortgagee. Previously he had been, in the view of equity, a mere incumbrancer. Under the order the beneficial ownership for the first time vested in him, and this principle seems to be applicable also to the change in the mortgagee's title from the holding of a term as an incumbrance to the beneficial ownership of the fee simple: see *Heath v Pugh* (1881) 6 QBD 345 at 360, CA, per Lord Selborne LC. As to the statutory effect of a foreclosure order see PARA 607. As to the mortgagee's liability in respect of leaseholds see PARA 363; and cf *Re Loom, Fulford v Reversionary Interest Society Ltd* [1910] 2 Ch 230.

11 See the Law of Property Act 1925 s 89(2); and PARA 607. As to the application of this provision to leaseholds where the mortgage affects only part of the land comprised in the lease see PARA 448.

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567. Loss of right to foreclose.

The right to bring proceedings for foreclosure may be lost by effluxion of time. The periods of limitation applicable to foreclosure claims in respect of land or personalty and the length of the areas of interest recoverable in foreclosure claims are considered elsewhere¹.

1 See PARA 515.

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568. Foreclosure of equitable mortgage.

The right of foreclosure exists in the case of an equitable mortgagee¹ who has taken an agreement for a legal mortgage² whether the charge relates to land³ or to personal estate⁴. The judgment in such a case is prefaced by a declaration of charge and, in order to complete the mortgagee's title, it directs a conveyance to him of the legal estate⁵ or, if necessary in the case of a chose or thing in action, the execution by the mortgagor of a power of attorney⁶. The remedy of foreclosure is available in respect of policies of insurance⁷, stocks and shares⁸, debentures charging uncalled capital⁹ and pensions¹⁰, reversionary as well as present interests¹¹, and a partnership share¹².

1 As to foreclosure or sale by a trustee under a charge in his own favour see *Darke v Williamson* (1858) 25 Beav 622. Cf *Tennant v Trenchard* (1869) 4 Ch App 537.

2 *Perry v Keane*, *Perry v Partridge* (1836) 6 LJCh 67; *Cox v Toole* (1855) 20 Beav 145. As to the formalities for the creation of an equitable mortgage see PARA 238 et seq. As to the effect of dismissal of a claim for redemption see PARA 670.

3 See *Tylee v Webb* (1843) 6 Beav 552; *Pryce v Bury* (1854) LR 16 Eq 153n; *James v James* (1873) LR 16 Eq 153; *Re Owen* [1894] 3 Ch 220 at 227.

4 See *London and Midland Bank v Mitchell* [1899] 2 Ch 161; *Harrold v Plenty* [1901] 2 Ch 314 (cases of the deposit of share certificates); *Re Kerr's Policy* (1869) LR 8 Eq 331 at 336 (policy of insurance). In this respect the position of a mortgagee by deposit of share certificates differs from that of a mere pledgee of chattels who has no right of foreclosure: see eg *Harrold v Plenty* above at 316; *Stubbs v Slater* [1910] 1 Ch 632 at 639, CA. In *Carter v Wake* (1877) 4 ChD 605 (approved in *Gilligan and Nugent v National Bank Ltd* [1901] 2 IR 513 at 538), a person with whom bearer bonds were deposited by way of security was held to be a mere pledgee and therefore not entitled to foreclosure, but it seems doubtful whether this decision can be considered to be of authority in so far as it decides that deposited bearer securities are the subject of pledge and not of mortgage in view of the comments in *Sadler v Worley* [1894] 2 Ch 170 at 175; *Harrold v Plenty* above at 316; and *Stubbs v Slater* above at 639. As to the distinction between a mortgage and a pledge see PARA 112.

5 *Marshall v Shrewsbury* (1875) 10 Ch App 250 at 254.

6 *James v Ellis* (1871) 19 WR 319 (power of attorney to receive pension). See also **CHOSSES IN ACTION** vol 13 (2009) PARA 76. As to powers of attorney see **AGENCY** vol 1 (2008) PARA 31 et seq.

7 See note 4.

8 *Booking v Rendell* (1852) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1923; *General Credit and Discount Co v Glegg* (1883) 22 ChD 549 at 553-554. See also note 4.

9 See *Sadler v Worley* [1894] 2 Ch 170. See also **COMPANIES** vol 15 (2009) PARA 1379.

10 *James v Ellis* (1871) 19 WR 319.

11 *Slade v Rigg* (1843) 3 Hare 35; *Wayne v Hanham* (1851) 9 Hare 62. The terms of the mortgage may, however, show that the mortgagee is entitled to neither foreclosure nor sale, but only to repayment out of the fund when it falls into possession: *Stamford, Spalding and Boston Banking Co v Ball* (1862) 4 De GF & J 310.

12 *Redmayne v Forster* (1866) LR 2 Eq 467. See also **PARTNERSHIP** vol 79 (2008) PARA 126.

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(ii) Where Sale is Appropriate Remedy

569. Where foreclosure is not available.

Where there is a mere charge without an agreement for a legal mortgage¹, or a charging order² or where the circumstances give rise to an equitable lien, such as a vendor's lien³, the remedy is by sale and foreclosure is not possible.

1 *Tennant v Trenchard* (1869) 4 Ch App 537 at 542; *Re Owen* [1894] 3 Ch 220 at 227; *Shea v Moore* [1894] 1 IR 158, CA. See also PARA 106. Foreclosure was, however, treated as the remedy for the charge in *Hugill v Wilkinson* (1888) 38 ChD 480, perhaps because the security was more than a mere charge and operated as an equitable conveyance.

2 As to the nature and effect of a charging order see **CIVIL PROCEDURE** vol 12 (2009) PARA 1467 et seq.

3 *Neate v Duke of Marlborough* (1838) 3 My & Cr 407 at 417; *Munns v Isle of Wight Rly Co* (1870) 5 Ch App 414; *Marshall v South Staffordshire Tramways Co* [1895] 2 Ch 36 at 50, CA. The lien must, however, first be judicially declared: see **LIEN** vol 68 (2008) PARA 880.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(ii) Where Sale is Appropriate Remedy/570. Statutory jurisdiction to order sale in foreclosure proceedings.

570. Statutory jurisdiction to order sale in foreclosure proceedings.

In proceedings for foreclosure, the court may direct a sale of the mortgaged property on the request of the mortgagee or of any person interested either in the mortgage money or in the right of redemption, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the proceedings¹.

¹ See the Law of Property Act 1925 s 91(2); and PARA 616.

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571. When sale may be directed.

A sale may be directed at any time before the foreclosure has become absolute¹. Where an application to enlarge the time for payment is pending, the sale may be enforced on application for foreclosure absolute². Similarly, an order for foreclosure absolute may be made after an order for sale³. The only condition is that request must be made by one of the persons specified. This gives rise to the court's discretionary power, and accordingly the order may be made on an interim application⁴. If, however, the claim requests foreclosure only and the mortgagor does not appear, an order for sale will not be made unless he has had notice⁵.

¹ *Union Bank of London v Ingram* (1882) 20 ChD 463, CA. As to the order absolute see PARAS 603-607. The authorities referred to in this paragraph must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

² *Weston v Davidson* [1882] WN 28.

³ *Lloyds Bank Ltd v Colston* [1912] WN 26.

⁴ *Woolley v Colman* (1882) 21 ChD 169. Cf *London and County Banking Co v Dover* (1879) 11 ChD 204. As to interim applications see CPR Pt 25; and **CIVIL PROCEDURE** vol 11 (2009) PARA 315 et seq.

⁵ *South Western District Bank v Turner* (1882) 31 WR 113.

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572. When sale is directed.

A sale is generally directed where the property is worth more than the amount secured by the mortgage, to enable a mortgagor who cannot raise the sum required to redeem to get the

benefit of the surplus¹. It may also be directed to avoid the delay and expense which is occasioned by foreclosure and redemption in a case where there are a great number of successive mortgages². An order for sale will not be made in the absence of any evidence as to the value³, nor against the claimant's wish if the property is situated in several places and cannot be advantageously sold in one lot⁴, nor where the order would necessarily include property not subject to the mortgage⁵. An order for sale will be refused if the security is deficient and the mortgagor's application is based only on a possible rise in value⁶, or where the value of the property is reduced because the mortgagee is an assured tenant of the property⁷ with a right to retain possession after any sale⁸. A sale may, however, be ordered on the terms of the subsequent mortgagee or the mortgagor requesting a sale paying a sum into court to guarantee the claimant against loss⁹.

1 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA.

2 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA.

3 *Smithett v Hesketh* (1890) 44 ChD 161 at 163.

4 *Provident Clerks' Mutual etc Association v Lewis* (1892) 62 LJCh 89.

5 *Gibbs v Haydon* (1882) 30 WR 726.

6 *Hurst v Hurst* (1852) 16 Beav 372 at 375; *Merchant Banking Co of London v London and Hanseatic Bank* (1886) 55 LJCh 479; *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA. As to ordering foreclosure in lieu of sale, where, owing to the value of the property, it would be a useless expense to direct a sale see *Lloyds Bank Ltd v Colston* [1912] WN 26.

7 Under the Housing Act 1988 Pt I (ss 1-45): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1011 et seq. This also applies to statutory tenants under the Rent Act 1977: see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 831 et seq.

8 *Silsby v Holliman* [1955] Ch 552, [1955] 2 All ER 373. See **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 840 et seq, 1065 et seq.

9 *Norman v Beaumont* [1893] WN 45; *Cripps v Wood* (1882) 51 LJCh 584.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(iii) When Right to Foreclose Arises/573. Time when right arises depends on proviso for redemption.

(iii) When Right to Foreclose Arises

573. Time when right arises depends on proviso for redemption.

So long as the mortgagor has a legal right of redemption there can be no foreclosure; but when the time for repayment of the loan is past, the right to commence foreclosure proceedings arises unless the mortgagee has by special stipulation postponed the right¹. Consequently, the time when the right arises depends on the form of the proviso for redemption, if any². If a day is fixed for redemption, the right arises on default in payment on that day; if the proviso is for redemption on payment of the principal on demand, the right arises after demand and a reasonable time to comply with it³.

1 See *Bonham v Newcomb* (1689) 1 Vern 233n, HL (proviso for redemption at any time during the mortgagor's life). The right of foreclosure is not affected by the mortgagee's statutory power of sale: see the Law of Property Act 1925 s 106(2); and PARA 443 et seq.

2 See PARA 221. Where there is no express proviso, it is a question of construction whether a breach of covenant by the mortgagor is such as to debar him at law from recovering his property: see *Twentieth Century Banking Corp Ltd v Wilkinson* [1977] Ch 99, [1976] 3 All ER 361.

3 See *Balfe v Lord* (1842) 2 Dr & War 480. See also PARA 221.

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574. Effect where proviso conditional on payment of interest.

The proviso for redemption usually refers to the covenant for payment and makes the right of redemption depend on payment of principal and interest in accordance with that covenant¹. Where it does not do so, the proviso is independent of the covenant, and, if there is a proviso for redemption on payment of the principal at a distant date with interest in the meantime, there can be no foreclosure before the day fixed, notwithstanding that there is a covenant for periodical payment of interest and that the mortgagor is in default as to a payment². The question is, it seems, one of construction of the mortgage³, and if the proviso for redemption is conditional on payment of intermediate interest, where, for instance, it is a proviso for redemption on payment of principal on a fixed day with interest half-yearly in the meantime, or on payment of principal and interest in accordance with the covenant, the right to foreclose arises upon default in payment of interest⁴.

1 As to the covenant for repayment see PARA 208.

2 *Re Turner, Turner v Spencer* (1894) 43 WR 153; *Williams v Morgan* [1906] 1 Ch 804; and see PARA 207 et seq.

3 See *Mohamedali Jaffer Karachiwalla v Noorally Rattanshi Rajan Nanji* [1959] AC 518, [1959] 1 All ER 137, PC (distinguishing *Williams v Morgan* [1906] 1 Ch 804).

4 *Burrowes v Molloy* (1845) 2 Jo & Lat 521 at 526; *Edwards v Martin* (1856) 25 LJCh 284. See also *Gladwyn v Hitchman* (1690) 2 Vern 135; *Kidderminster Mutual Benefit Building Society v Haddock* [1936] WN 158.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(iii) When Right to Foreclose Arises/575. Loan for a term conditional on payment of interim interest.

575. Loan for a term conditional on payment of interim interest.

Instead of fixing a distant date for redemption, it is usual, when the loan is to continue for a term certain, to fix the usual period of six months, and then to provide that the money is not to be called in or steps to be taken to enforce the mortgage for the agreed term or until after a specified notice has been given¹. The benefit of such a provision is, however, lost if the mortgagor gives charges for further advances without the provision, and agrees that the further charges are not to be redeemed except on payment of all the advances². Moreover, such a provision is made conditional on payment of interest and observance of the mortgagor's covenants, and the right of foreclosure arises on default in such payment or observance³. The default is not waived merely by subsequent acceptance of interest⁴, but may be waived otherwise⁵. In the absence of such a condition, however, default in payment of interest does not accelerate the time for foreclosure⁶.

- 1 See PARA 209.
- 2 *Haywood v Gregg* (1875) 24 WR 157.
- 3 *Stanhope v Manners* (1763) 2 Eden 197; *Seaton v Twyford* (1870) LR 11 Eq 591. As to non-payment of premiums in a mortgage of a policy of insurance see *Sapio v Hackney* (1907) 51 Sol Jo 428.
- 4 *Keene v Biscoe* (1878) 8 ChD 201. See also *Stanhope v Manners* (1763) 2 Eden 197; and PARA 214.
- 5 *Re Taaffe's Estate* (1864) 14 I Ch R 347. See also *Langridge v Payne* (1862) 2 John & H 423; *Seal v Gimson* (1914) 110 LT 583 (where receipt of interest was treated as one of the facts relevant to determining whether the mortgagee had exercised his right to call in the money before the stipulated period for breach of covenant).
- 6 *Burrowes v Molloy* (1845) 2 Jo & Lat 521.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(iii) When Right to Foreclose Arises/576. Equitable mortgages and charges.

576. Equitable mortgages and charges.

Where there is no actual mortgage, but only an agreement to execute a mortgage, the right of foreclosure arises on non-payment of the money at the time agreed upon, or, if no time is agreed upon, then on non-payment within a reasonable time after demand¹.

- 1 See *Fitzgerald's Trustee v Mellersh* [1892] 1 Ch 385 at 390; cf as to sale *France v Clark* (1883) 22 ChD 830 (affd (1884) 26 ChD 257, CA); *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA. See also *Jones v Woodward* (1917) 116 LT 378; *London County and Westminster Bank Ltd v Tompkins* [1918] 1 KB 515, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(iv) Who may Institute Foreclosure Proceedings/577. Mortgagee or his assignee.

(iv) Who may Institute Foreclosure Proceedings

577. Mortgagee or his assignee.

The mortgagee may institute foreclosure proceedings so long as he remains entitled to the mortgage. After the mortgagee has assigned the mortgage security, the assignee is entitled to bring the proceedings¹, but he is subject to the state of the accounts between the mortgagor and the mortgagee at the date of the transfer, and also to any equities then existing in the mortgagor's favour². A subsequent mortgagee can sue to foreclose the mortgagor and incumbrancers subsequent to himself³.

- 1 *Platt v Mendel* (1884) 27 ChD 246 at 247. As to the effect of an assignment of the debt apart from the security see PARA 365.
- 2 See *Withington v Tate* (1869) 4 Ch App 288; *Turner v Smith* [1901] 1 Ch 213. See also PARA 380.
- 3 *Rose v Page* (1829) 2 Sim 471; *Slade v Rigg* (1843) 3 Hare 35 at 38.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(iv) Who may Institute Foreclosure Proceedings/578. Personal representatives and trustees.

578. Personal representatives and trustees.

On the mortgagee's death without having transferred the mortgage, the debt and security devolve upon his personal representatives, who can institute foreclosure proceedings until they have transferred the mortgage to a beneficiary or a transferee for value¹. Where the legal estate is in a trustee for the mortgagee, he must be a party²; he should, if possible, be joined as claimant³. Trustees sufficiently represent their beneficiaries for the purpose of suing for foreclosure⁴.

1 See PARA 388. See also PARA 533.

2 *Wood v Williams* (1819) 4 Madd 186. See also *Bartle v Wilkin* (1836) 8 Sim 238.

3 *Smith v Chichester* (1842) 2 Dr & War 393 at 404. See also *Browne v Lockhart* (1840) 10 Sim 420 at 426.

4 See CPR 19.7A; and **CIVIL PROCEDURE** vol 11 (2009) PARA 227; **TRUSTS** vol 48 (2007 Reissue) PARA 1081.

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579. Co-mortgagees.

Where there are co-mortgagees, they may institute proceedings jointly, or, if some are unwilling to be joined as claimants or have done some act precluding them from suing in that capacity, one may sue by himself, provided he makes all the others defendants¹. A mortgagee entitled to part only of the mortgage money, however, may not sue alone and obtain foreclosure of a corresponding part of the mortgaged estate². Unless the advance is made on a joint account, the mortgagees are tenants in common of the mortgage money, and, on the death of one, his representatives are necessary parties³.

1 *Davenport v James* (1847) 7 Hare 249; *Luke v South Kensington Hotel Co* (1879) 11 ChD 121, CA. See also *Remer v Stokes* (1856) 4 WR 730. As to mortgages of tolls or rates see *Mellish v Brooks* (1840) 3 Beav 22; *Watts v Lord Eglinton* (1846) 15 LJCh 412.

2 *Palmer v Earl of Carlisle* (1823) 1 Sim & St 423. See also *Lowe v Morgan* (1784) 1 Bro CC 368.

3 *Vickers v Cowell* (1839) 1 Beav 529. As to advances on joint account see PARA 212. The co-mortgagees cannot now at law be tenants in common of the mortgaged property: see PARA 156. As to foreclosure or sale by debenture holders see **COMPANIES** vol 15 (2009) PARA 1378 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(v) Parties to Proceedings/580. Persons interested in equity of redemption.

(v) Parties to Proceedings

580. Persons interested in equity of redemption.

The judgment in foreclosure proceedings gives to all persons interested in the equity of redemption the opportunity of redeeming. In default of their doing so, they are foreclosed. All those persons, therefore, must be parties, or be sufficiently represented by persons who are parties¹.

1 *Tylee v Webb* (1843) 6 Beav 552 at 557; *Gedye v Matson* (1858) 25 Beav 310; *Caddick v Cook* (1863) 32 Beav 70; *Griffith v Pound* (1890) 45 ChD 553 at 567. See also *Audsley v Horn* (1858) 26 Beav 195 at 197 (the parties to the mortgage deed, and those claiming under them, should alone be parties to the cause). As to the parties to foreclosure where several mortgagors have mortgaged their interests see *Gee v Liddell* [1913] 2 Ch 62.

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581. Subsequent incumbrancers.

In proceedings by the first mortgagee all subsequent incumbrancers are necessary parties, otherwise they will not be bound¹. If they are discovered pending the proceedings they must be added as parties². If the claimant mortgagee is himself interested in the subsequent incumbrance, he must not be made a defendant; the same person cannot be claimant and defendant³. Persons entitled to contribution out of the mortgaged property, by reason of being interested in other property comprised in a later incumbrance, are also necessary parties⁴. A later mortgagee can bring proceedings to foreclose those behind him and the mortgagor, and to such proceedings the subsequent incumbrancers are necessary parties, but not the prior incumbrancers⁵.

1 *Ormsby v Thorpe* (1808) 2 Mol 503.

2 *Keith v Butcher* (1884) 25 ChD 750; *Burgess v Sturges* (1851) 14 Beav 440.

3 *Wavell v Mitchell* (1891) 64 LT 560; *Re Phillips, Public Trustee v Meyer* (1931) 101 LJCh 338.

4 See *Gee v Liddell* [1913] 2 Ch 62. As to parties to an application for permission to realise the security where this is necessary see *Re Hill's Application* (1918) 88 LJCh 136, CA.

5 *Rose v Page* (1829) 2 Sim 471; *Brisco v Kenrick* (1832) 1 Coop temp Cott 371; *Richards v Cooper* (1842) 5 Beav 304; *Slade v Rigg* (1843) 3 Hare 35 at 38; *Johnson v Holdsworth* (1850) 1 Sim NS 106. As to the necessary parties in proceedings to redeem prior incumbrancers see PARA 659.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(v) Parties to Proceedings/582. Persons having a direct charge on the property.

582. Persons having a direct charge on the property.

Generally all persons having a direct charge on the equity of redemption are necessary parties¹. Thus debenture holders², or, if there is a debenture trust deed, the trustees³, are

necessary parties to foreclosure by a prior mortgagee. Where there are numerous persons having the same interest, one or more of them may represent them all⁴. A judgment creditor of the mortgagor must be joined if he has obtained an order charging the judgment debt on the land affected by the mortgage⁵. Where a partnership share is mortgaged, and by the articles of partnership the partners have a right of pre-emption over each other's shares, the other partners are necessary parties to foreclosure of the share⁶.

1 See eg *Gedye v Matson* (1858) 25 Beav 310 at 311 (surety who has paid part of mortgage debt). For the principle that a surety who has paid off the mortgage debt has a charge on the mortgaged property see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1019, 1142. It seems that a surety who has not paid off the mortgage debt in whole or in part, and is bound only by his personal covenant, is not a necessary party to foreclosure proceedings: *Newton v Earl of Egmont* (1831) 4 Sim 574 at 584; *Gedye v Matson*; *Gee v Liddell* [1913] 2 Ch 62 at 73. For the rule that only one period of redemption is allowed to a mortgagor and his surety see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1142. See also PARA 601.

2 *Wallace v Evershed* [1899] 1 Ch 891. See also **COMPANIES** vol 15 (2009) PARA 1382. Although general provision is made for the making of a representation order where there are numerous persons having the same interest in proceedings (see CPR 19.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 229), it seems that, in the case of foreclosure proceedings brought by a mortgagee where debenture holders are necessary parties, the better view is that all the debenture holders must be joined: see *Griffith v Pound* (1890) 45 ChD 553; *Westminster Bank Ltd v Residential Properties Improvement Co Ltd* [1938] Ch 639, [1938] 2 All ER 374; but contrast *Fairfield Shipbuilding and Engineering Co Ltd v London and East Coast Express Steamship Co Ltd* [1895] WN 64 (where a representation order was made in such a case); and cf *Re Wilcox & Co (late WH Fox and Co) Ltd*, *Hilder v Wilcox & Co Ltd* [1903] WN 64 (representative of subsequent debenture holders appointed in proceedings by first debenture holders).

3 *Cox v Dublin City Distillery Co Ltd (No 3)* [1917] 1 IR 203, CA.

4 See CPR 19.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 229. It seems that an order will not be made under this rule appointing one debenture holder to represent the class of debenture holders: see note 2.

5 See *Earl of Cork v Russell* (1871) LR 13 Eq 210 (disapproving *Mildred v Austin* (1869) LR 8 Eq 220, and holding that a judgment creditor is not a necessary party until he has an actual charge on the land). For the court's power to impose a charge on the land of a judgment debtor see PARA 111; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1467 et seq. As to the necessity for the registration of a charging order see PARA 291.

6 *Redmayne v Forster* (1866) LR 2 Eq 467. As to mortgages by partners see PARA 162 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(v) Parties to Proceedings/583. Several properties in one mortgage.

583. Several properties in one mortgage.

The mortgagee cannot in general foreclose part only of the mortgaged property. If several properties are mortgaged together, and are afterwards incumbered or disposed of separately, the incumbrancers on and persons interested in the equity of redemption of each property are necessary parties to the first mortgagee's foreclosure proceedings¹. If, however, the two properties are subject to separate prior mortgages, the later mortgagee of both can redeem one by itself, and then he may foreclose the mortgagor as to that only² unless there is a right to consolidation in respect of the prior mortgages³. A later mortgagee of one property can foreclose those behind him on that property without making the persons who are interested in the equity of redemption of the other property parties to the proceedings⁴.

1 See eg *Payne v Compton* (1837) 2 Y & C Ex 457.

2 See PARA 668.

3 See *Ireson v Denn* (1796) 2 Cox Eq Cas 425; and PARA 659. See also PARA 581.

4 See PARA 581.

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(vi) Procedure

584. Form of proceedings.

A mortgage claim for foreclosure is begun by claim form in the Chancery Division of the High Court¹ or, subject to the amount owing, in the county court of the district in which the mortgaged property is situate².

1 See PARA 530 et seq. Claims for foreclosure in respect of different mortgages by the same mortgagor can be consolidated: see CPR 3.1(2)(g), (h); and **CIVIL PROCEDURE** vol 11 (2009) PARA 247. See also *Holden v Silkstone and Dodworth Coal and Iron Co Ltd* (1881) 30 WR 98.

2 See PARAS 530-531. As to the commencement of a claim in the county court see PARA 534. The county court's exclusive jurisdiction in relation to dwelling houses outside Greater London does not apply to proceedings for foreclosure or sale in which a claim for possession of the mortgaged property is also made: see the County Courts Act 1984 s 21(4); and PARA 530. As to claims for possession see PARA 546 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(vi) Procedure/585. Foreclosure or sale.

585. Foreclosure or sale.

Where the mortgagee is suing for foreclosure only, the claim is that an account may be taken of what is due to him on the mortgage, which must be specifically described, for principal, interest and costs, and that the mortgage may be enforced by foreclosure¹. If the mortgagee is willing to have a sale directed by the court, he will claim foreclosure or sale, but even if foreclosure only is claimed the court may still direct a sale².

1 As to procedure under the old law see *Bake v French* [1907] 1 Ch 428; *Weymouth v Davis* [1908] 2 Ch 169; *Practice Note* [1932] WN 6. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 As to the jurisdiction to order a sale see PARAS 570-572.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(vi) Procedure/586. Account.

586. Account.

If the mortgagee is in possession, he will ask for an account of rents and profits received and for the allowance of any special expenses¹.

¹ See PARAS 592-593, 766-767. As to accounts generally see PARA 705 et seq; and as to costs, charges and expenses see PARA 739 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(vi) Procedure/587. Possession.

587. Possession.

If the mortgagee is not in possession and there is likely to be any difficulty as to obtaining possession, he may claim also delivery of possession, although this is not necessary. A claim for foreclosure includes a claim for possession, and delivery of possession may be ordered as against the mortgagor even though not asked for by the claim¹, notwithstanding that the mortgagor does not appear², but will not be ordered without notice where not asked for³. The order may be made after foreclosure absolute⁴, even if not asked for by the claim⁵. Where foreclosure has taken place by reason of the failure of the claimant in a mortgage claim for redemption⁶ to redeem, the defendant in whose favour the foreclosure has taken place may apply for an order for delivery to him of possession of the mortgaged property and the court may make such order as it thinks fit⁷.

¹ See CPR 16.2(5); and **CIVIL PROCEDURE** vol 11 (2009) PARA 585. See also *Manchester and Liverpool Bank v Parkinson* (1889) 60 LT 258. As to proceedings for possession see PARA 546 et seq. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

² *Salt v Edgar* (1886) 54 LT 374; *Lacon v Tyrrell* (1887) 56 LT 483; *Best v Applegate* (1887) 37 ChD 42.

³ *Le Bas v Grant* (1895) 64 LJCh 368.

⁴ *Keith v Day* (1888) 39 ChD 452, CA. As to foreclosure absolute see PARA 603 et seq.

⁵ *Jenkins v Ridgley* (1893) 41 WR 585.

⁶ As to proceedings for redemption see PARA 656 et seq.

⁷ As to proceedings relating to possession see CPR Pt 55; and PARA 546 et seq.

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588. Payment on covenant.

In a claim for foreclosure, the mortgagee may include a claim for payment under the covenant in the mortgage deed¹.

¹ *Dymond v Croft* (1876) 3 ChD 512; *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA. These authorities should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(vi) Procedure/589. Declaration of title.

589. Declaration of title.

If the mortgagee is claiming enforcement by foreclosure or sale of a charge created by deposit of title deeds¹, or to enforce by sale a charge or equitable lien, he may claim in the first instance a declaration that he is to be considered as a mortgagee, or that he is entitled to a charge or lien, and will then go on to claim an account and the enforcement of the security².

¹ As to charges created by deposit of title deeds see PARA 119 et seq. It is no longer possible to create a charge by deposit of title deeds alone: see PARA 118.

² See *Marshall v Shrewsbury* (1875) 10 Ch App 250 at 254. This authority should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

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590. Procedure.

The Civil Procedure Rules make no specific provision for the procedure to be adopted in a foreclosure claim. If the claim expressly or impliedly includes a claim for possession, the procedure applicable to such a claim should be followed¹.

¹ For the procedure relating to possession claims see PARA 546 et seq.

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591. Powers of adjournment etc.

The application of the additional statutory powers of adjournment, stay, suspension or postponement to foreclosure proceedings in respect of instalment mortgages is considered elsewhere in this title¹. Where the only claim is for foreclosure, there is a statutory power of adjournment; where the claim is for foreclosure and possession there is power, in appropriate circumstances, to adjourn the foreclosure claim, or adjourn the possession claim, or stay or suspend any order for possession or postpone the date for delivery of possession².

¹ See the Administration of Justice Act 1973 s 8; and PARA 555.

² See the Administration of Justice Act 1970 ss 36(1), (2), 38A (PARA 553); the Administration of Justice Act 1973 s 8(3) (PARA 555).

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(vii) The Order

A. ACCOUNTS AND INQUIRIES

592. Covenant account and mortgage account.

The order made in foreclosure proceedings directs, in the first instance, that the necessary accounts are to be taken, and any inquiries made which are essential to taking the accounts or required for ascertaining the parties' rights. If payment is claimed, two accounts may have to be taken, as the sum recoverable on the covenant for payment and the sum which must be paid as the price of redemption are different. The former sum is limited to principal and interest, and to so much of the costs of the proceedings as would have been incurred if the proceedings had been brought for payment only¹. Accordingly, the covenant account is of principal and interest, and there follows judgment for the amount certified to be due and for the assessed and apportioned costs.

If the amount of debt and interest is proved, admitted or agreed at the trial, the mortgagee is entitled to judgment for immediate payment; otherwise an account is taken, and he is entitled to judgment for payment immediately the amount is certified, but the judge has a discretion to suspend the judgment². In certain circumstances, immediate payment may not be directed if the particulars of claim ask for an account³. The sum in respect of costs does not include expenses which the mortgagee is entitled to charge against the mortgaged property but which are not payable by the mortgagor personally⁴.

The mortgage account is an account of what is due to the claimant under and by virtue of his mortgage, and for his assessed costs in the proceedings. In taking this account, anything which has been recovered under the order for payment is deducted and the balance due to the claimant is certified⁵. If there is no claim for payment, only the mortgage account is directed to be taken.

1 *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 As to an order nisi see PARA 594.

3 *Faithfull v Woodley* (1889) 43 ChD 287. As to the form of judgment where the debt is payable by instalments see *Greenough v Littler* (1880) 15 ChD 93. As to arrears of interest recoverable see **LIMITATION PERIODS** vol 68 (2008) PARA 1128.

4 See PARA 739 et seq.

5 *Lee v Dunsford* (1884) 45 LJCh 108.

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593. Account of rents and profits.

If the mortgagee is in possession, the order directs an account of rents and profits received by him or by any other persons by his order or for his use, or which without his wilful default might have been so received¹. The amount due from him on this account is directed to be deducted from the aggregate amount due on the mortgage account and the balance certified. The order also contains a direction for any further accounts and inquiries which the circumstances require, such as an account of proceeds of sale of part of the property; an inquiry as to

deterioration in value, or loss through an improper sale; and an inquiry as to priority of incumbrancers².

1 As to the taking of an account on the footing of wilful default see PARA 428. As to taking the account with rests see PARA 716 et seq.

2 As to accounts between mortgagor and mortgagee see PARA 705 et seq. Where the account is agreed, or is so simple that the sum can be ascertained in court, an order may be made without directing the amount to be ascertained by an account. As to master's orders see PARA 596.

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B. FORECLOSURE NISI

594. Form of order nisi.

In foreclosure proceedings by the mortgagee against the mortgagor alone, the order usually allows six months from the date of the master's order¹ as the period within which the defendant may redeem. The order directs that upon payment of the specified sum at the time and place appointed², the claimant is to give a receipt³ and deliver up the title deeds to the defendant or as he appoints, but that in default of payment the defendant is to be foreclosed. Therefore, the order is not an absolute order for foreclosure, but only for foreclosure nisi, that is, unless the defendant redeems within the time allowed. If the mortgagee applies for possession⁴, the order will direct the mortgagor to deliver up possession to him describing the property as in the parcels in the mortgage deed. Application for possession may also be made subsequently⁵.

1 As to the master's order see PARA 596.

2 See PARA 596.

3 In pursuant to the Law of Property Act 1925 s 115: see PARA 645.

4 As to when an order for possession can be made see PARA 587.

5 *Keith v Day* (1888) 39 ChD 452, CA. Cf PARA 605.

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595. Directions for avoiding unnecessary expense.

In order to make it unnecessary to go to the expense of preparing deeds, powers of attorney and form of receipt to hand over in case a mortgagor should attend to redeem at the time and place appointed by the master's order¹ for redemption, all orders for foreclosure², unless the court otherwise directs, are to provide: (1) that the mortgagor must give seven days' notice of his intention to attend and redeem; and (2) that if no such notice is given but the mortgagor in fact attends at the appointed time and place then at the mortgagee's option the time for

redemption must be extended for one week, thus giving the mortgagee's solicitor time to prepare the necessary documents³.

1 As to the master's order see PARA 596.

2 The provisions set out in the text also apply to orders for redemption: see *Practice Directions* [1955] 1 All ER 30, [1955] 1 WLR 36; and PARA 666. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

3 *Practice Directions* [1955] 1 All ER 30, [1955] 1 WLR 36.

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596. Master's order.

The master's order calculates further interest for six months from its date and fixes a time on the day at the expiration of six months when, and a place where, the aggregate sum made up of the certified balance and the further interest is to be paid¹. The mortgagor is not entitled to redeem before the appointed day on payment of principal and interest only until the date of payment together with costs².

1 The result of the account before the master is expressed in the form of a notice of decision: see CPR Pt 40; *Practice Direction--Accounts, Inquiries etc* PD 40 para 13; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1526 et seq.

2 *Hill v Rowlands* [1897] 2 Ch 361, CA.

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597. Order against second mortgagee and mortgagor.

Where proceedings are brought by a first mortgagee against a second mortgagee and the mortgagor, successive periods may be allowed for redemption, and in that case the first right of redemption is given to the second mortgagee and in default he is foreclosed¹. The claimant's subsequent interest and costs are then computed and assessed, and a further three months may be allowed for the mortgagor to pay the original and additional amount, and in default he also is foreclosed; but the second mortgagee must be foreclosed absolutely before proceedings are taken to foreclose the mortgagor². This completes the foreclosure contemplated.

1 If the mortgagor is bankrupt, and the mortgagee has valued his security, the trustee in bankruptcy is entitled to redeem at that value, and the order must show this: *Knowles v Dibbs* (1889) 37 WR 378. In *Hayes and Harlington UDC v Williams's Trustee* [1936] Ch 315 (where the order was made in the form of 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1892), the mortgagees, who alleged that they had undervalued their security, obtained a discharge of the order and a fresh order with a declaration that they were entitled to hold the mortgaged property as against the mortgagor's trustee in bankruptcy for the amount due to them on the mortgage. This was to enable them to apply to amend their proof in bankruptcy.

2 *Whitbread v Lyall* (1856) 8 De GM & G 383; *Webster v Patteson* (1884) 25 ChD 626.

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598. Successive redemptions.

If the second mortgagee redeems, proceedings are thereafter for foreclosure between him and the mortgagor; subsequent interest is computed on the amount paid to the claimant; and the ordinary account is taken of the second mortgage¹. The amount paid to the claimant, with subsequent interest, and the amount certified to be due to the second mortgagee under his mortgage and his costs, give the aggregate sum at which the mortgagor can redeem within three months, and in default he is foreclosed. The result is to clear the property of all incumbrances in favour of one of the parties to the proceedings, either the first mortgagee, the second mortgagee or the mortgagor, according as the rights of redemption are exercised or not².

The successive rights were formerly worked out on the same principle where there were third and subsequent mortgages, and the property was in the same manner cleared of all incumbrances³, but now the excessive complication of such an order, and the delay consequent on successive redemptions, is usually avoided by giving only one time for redemption to all the later incumbrancers with liberty, on any of them redeeming, to apply to determine their rights among themselves⁴. By voluntarily submitting to foreclosure, a later mortgagee does not necessarily lose his remedy on the covenant against the mortgagor⁵.

1 As to accounts see PARA 592.

2 As to rights of redemption see PARA 302 et seq.

3 As to the order of redemption where the claimant is a mortgagee who has consolidated his mortgages, and the equities of redemption of the properties are in the hands of different assignees see *Beevor v Luck*, *Beevor v Lawson* (1867) LR 4 Eq 537; *Loveday v Chapman* (1875) 32 LT 689. As to consolidation see PARA 498.

4 See PARA 601.

5 *Worthington & Co Ltd v Abbott* [1910] 1 Ch 588.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(vii) The Order/B. FORECLOSURE NISI/599. Foreclosure limited to later incumbrancers.

599. Foreclosure limited to later incumbrancers.

A later incumbrancer may limit his claim to foreclosure against incumbrancers subsequent to himself and against the mortgagor, and, in this case, the prior incumbrancers are not affected by the order, as it operates only on the equity of redemption subsequent to those prior incumbrancers¹. Each incumbrancer subsequent to the claimant, and also the mortgagor, must redeem or be foreclosed, so that in the result the property is clear of the claimant's, and all the subsequent, incumbrances².

1 *Rose v Page* (1829) 2 Sim 471. See also PARA 598.

2 See PARA 598.

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600. Redemption by intervening incumbrancers.

Proceedings by the second mortgagee to redeem the first are in effect proceedings for foreclosure against the incumbrancers subsequent to himself and against the mortgagor. As regards the first mortgagee, the order is the same as that made in redemption proceedings¹. The account under the first mortgage is taken, and, if the claimant redeems, the order then proceeds, as in foreclosure proceedings, to give the subsequent incumbrancers, and ultimately the mortgagor, the chance of redeeming, and in default they are successively foreclosed². Therefore, if the claimant redeems and is not in his turn redeemed, he obtains the property free from incumbrances, at the price of the aggregate of the first mortgage and his own. If the claimant does not redeem, the proceedings are dismissed with costs, and this means that he has to pay the mortgagor's costs also³. In proceedings by an intervening incumbrancer against prior incumbrancers, the right of redemption is given to the mortgagees subsequent to the first in succession, and accordingly all mortgagees prior to the claimant must redeem or be foreclosed; after redemption by any one of them, those subsequent to him must likewise redeem or be foreclosed. If, however, the claimant fails to redeem, the proceedings are dismissed. If he redeems, then the successive rights of redemption, with foreclosure in default, are continued as in foreclosure proceedings⁴.

1 See PARAS 666, 668.

2 See PARA 599.

3 *Pelly v Wathen* (1849) 7 Hare 351; *Hallett v Furze* (1885) 31 ChD 312. See also PARA 669.

4 *Duberley v Waring* (1776) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1909. If the proceedings are dismissed, the claimant is foreclosed; but it is questionable whether the foreclosure of the prior intermediate incumbrances remains operative.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(vii) The Order/B. FORECLOSURE NISI/601. When one period of redemption is fixed.

601. When one period of redemption is fixed.

The rights of redemption of successive mortgagees¹ are not always preserved. The mortgagor himself is not entitled to any further period for redemption beyond the ordinary six months because he has incumbered the equity of redemption². When questions of priority arise between incumbrancers which do not affect the claimant, these need not be determined in his presence, and therefore, to avoid doing so, only one period of redemption is fixed for all the incumbrancers and the mortgagor, and the order is made without prejudice to the priority of the incumbrancers among themselves³. Similarly, where they, or some of them, do not appear, or do not put in a defence, only one period is allowed, as to do otherwise would be to fix their priorities in their absence⁴. It is the same whether the particulars of claim allege that the defendants are entitled, or only that they claim to be entitled, to incumbrances⁵.

Where a sale is ordered, only one time is allowed for redemption if the margin for subsequent incumbrancers will be small⁶. Established practice now is, generally, to fix only one period of redemption⁷, but subsequent incumbrancers, if their priorities are proved or admitted, although not the mortgagor, may obtain successive periods on showing a case for this indulgence⁸. If any of the defendants redeem, there is liberty to apply, and their respective rights will be worked out without notice to the claimant.

1 See PARAS 597-600.

2 *Platt v Mendel* (1884) 27 ChD 246 at 248. See also PARA 594. As to the equity of redemption see PARA 302 et seq.

3 *Bartlett v Rees* (1871) LR 12 Eq 395; *General Credit and Discount Co v Glegg* (1883) 22 ChD 549; *Lewis v Aberdare and Plymouth Co* (1884) 53 LJCh 741; *Tufnell v Nicholls* (1887) 56 LT 152.

4 *Doble v Manley* (1885) 28 ChD 664.

5 *Doble v Manley* (1885) 28 ChD 664; *Smithett v Hesketh* (1890) 44 ChD 161 at 164.

6 *Cripps v Wood* (1882) 51 LJCh 584.

7 *Smith v Olding* (1884) 25 ChD 462; *Platt v Mendel* (1884) 27 ChD 246 at 248; *Smithett v Hesketh* (1890) 44 ChD 161. Formerly the allowance of successive periods was usual (*Lewis v Aberdare and Plymouth Co* (1884) 53 LJCh 741), except in the case of judgment creditors (*Stead v Banks* (1852) 5 De G & Sm 560; *Bates v Hillcoat* (1852) 16 Beav 139).

8 *Platt v Mendel* (1886) 27 ChD 246 at 249; *Mutual Life Assurance Society v Langley* (1884) 26 ChD 686 at 692 (one additional period of three months allowed); *Bertlin v Gordon* [1886] WN 31 (one additional period of one month; the mortgage was of a reversionary interest likely to fall in soon); *Smithett v Hesketh* (1890) 44 ChD 161 (two additional periods of three months).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(vii) The Order/B. FORECLOSURE NISI/602. Foreclosure of equitable securities.

602. Foreclosure of equitable securities.

In proceedings for foreclosure of an equitable mortgage by deposit¹, the order is prefaced by a declaration that the claimant is entitled to be considered as a mortgagee of the premises comprised in the deeds². The order directs the usual accounts and foreclosure of the mortgagor in default of payment, and there is a direction for conveyance of the property to the claimant³.

1 As to equitable mortgage by deposit see PARA 119 et seq. It is no longer possible to create a mortgage of land by deposit of title deeds: see PARA 118.

2 *Parker v Sidney* [1897] WN 135. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

3 *Lees v Fisher* (1882) 22 ChD 283, CA. As to the usual form of order see PARA 594.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(viii) Foreclosure Absolute/603. Procedure to obtain order.

(viii) Foreclosure Absolute

603. Procedure to obtain order.

On non-payment of the amount stated to be due at the time and place described¹, the mortgagee is entitled to an order for foreclosure absolute as against the person or persons in default. The application is made to the master².

¹ le in the master's order: see PARA 596. It was previously held that there is no requirement that a master's order or a foreclosure nisi order should be served on the mortgagor: see *Lancashire and Yorkshire Reversionary Interest Co Ltd v Crowe* (1970) 114 Sol Jo 435. However the Civil Procedure Rules now provide that, unless the court directs otherwise, any order made otherwise than at trial must be served on the applicant and the respondent and any other person on whom the court orders it to be served: see CPR 40.4(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1140.

² As to the mode of making an application see CPR Pt 23; and **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq.

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604. Evidence in support.

On application for foreclosure absolute there must be a witness statement made by the mortgagee, or, if he attended by an agent, by the agent, of attendance at the prescribed time and place¹ and non-payment of the money², and also a witness statement by the mortgagee of non-payment since the appointed time³.

The statement of attendance should prove attendance during the whole of the appointed time by the mortgagee or his agent authorised by power of attorney to receive the money⁴, but a want of strict compliance with these formalities is not necessarily a ground for refusing the order⁵. These irregularities, however, prevent the order being of course, and the matter must be mentioned to the judge⁶. If one joint mortgagee is abroad, it is sufficient for the others to make the witness statement or affidavit⁷.

Where the mortgagee has received rents after default, the usual form of witness statement or affidavit must be altered⁸.

¹ See PARAS 594, 596.

² See *Docksey v Else* (1891) 64 LT 256. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq. As to the mode of making an application see CPR Pt 23; and **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq. If an applicant wishes to rely on matters set out in his application notice as evidence, the application notice must be verified by a statement of truth: see CPR 22.1(3); and **CIVIL PROCEDURE** vol 11 (2009) PARA 805.

³ *Barrow v Smith* (1885) 52 LT 798; *Docksey v Else* (1891) 64 LT 256. Cf *Frith v Cooke* (1885) 52 LT 798, where the mortgagee's personal affidavit of non-payment was dispensed with. All mortgagees in the jurisdiction should join in the witness statement or affidavit: *Bostock v Shaw* (1848) 10 LTOS 481; *Kinnaird v Yorke* (1889) 60 LT 380; *Docksey v Else* (1891) 64 LT 256. See also the text to note 7.

⁴ As to powers of attorney see **AGENCY** vol 1 (2008) PARA 31 et seq.

⁵ The order has been granted where the mortgagees attended during part of the appointed time only (see *Anon* (1844) 1 Coll 273; *Bernard v Norton* (1864) 10 LT 183), and even where the attendance was by an agent and he did not have a power of attorney to receive the money if the mortgagor did attend (see *Lechmere v Clamp (No 3)* (1862) 31 Beav 578; *London Monetary Advance and Assurance Society v Brown* (1868) 16 WR 782; *Macrae v Evans* (1875) 24 WR 55; *Cox v Watson* (1877) 7 ChD 196). The order was certainly granted where the agent had a power of attorney but omitted to bring it with him: see *Hart v Hawthorne* (1880) 42 LT

79; *Crawley v Fuller* [1890] WN 35. See also *Frith v Cooke* (1885) 52 LT 798 (defendant had never appeared in the proceedings; affidavit by the solicitors' clerk who attended to receive the money was accepted as sufficient).

6 *King v Hough* [1895] WN 60. As to the form of order under these circumstances see *Moore and Robinson's Nottinghamshire Banking Co v Horsfield* [1882] WN 43.

7 *Kinnaird v Yorke* (1889) 60 LT 380. See also note 3.

8 See *National Permanent Mutual Benefit Building Society v Raper* [1892] 1 Ch 54. See also PARA 722.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(viii) Foreclosure Absolute/605. Form of order.

605. Form of order.

The order for foreclosure absolute recites the order for an account in the order nisi, the certificate showing the sum found due, the time and place appointed for payment, and the evidence of attendance by the claimant or his agent and of non-payment; and orders that the mortgagor, or other defendant against whom it is made, is to stand from that time absolutely debarred and foreclosed of and from all equity of redemption in the mortgaged premises¹. If necessary an order for delivery of possession will be added, or this may be obtained subsequently². The order for foreclosure absolute does not by itself entitle the mortgagee to a writ of possession³.

In the case of an equitable mortgage of land or stock or a chose or thing in action, if a conveyance cannot be obtained from the mortgagor, then on the footing that the mortgagor is a trustee the court may under its statutory powers⁴ make a vesting order in relation to the mortgaged property⁵. The procedure by application for a vesting order has the advantage of avoiding cost and delay as compared with the alternative procedure⁶ of seeking the appointment of a third person to execute the conveyance⁷. If the defendant has in his possession any deeds affecting the title to the claimant's mortgage, these will be ordered to be given up, but a later mortgagee will not be ordered to deliver up deeds, subsequent to the claimant's mortgage, which affect only the equity of redemption⁸.

1 As to the order for foreclosure nisi see PARA 594. As to the equity of redemption see PARA 302 et seq.

2 *Keith v Day* (1888) 39 ChD 452, CA; *Manchester and Liverpool Bank v Parkinson* (1889) 60 LT 258; *Jenkins v Ridgley* (1893) 41 WR 585. See also PARA 587. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq. As to orders generally see CPR Pt 40; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1136.

3 *Wood v Wheeler* (1882) 22 ChD 281; *Wood v Smallpiece* [1942] Ch 190, [1942] 1 All ER 252, CA. As to obtaining a writ of possession where there is a judgment or order for the giving of possession see CPR Sch 1 RSC Ord 45 r 3; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1247, 1274. Where an order was not properly indorsed, because it omitted to name any time within which possession was to be given, and the claimants applied on motion for leave to issue a writ of attachment for non-compliance with the order, and the defendant appeared in person, the court ordered that the writ of attachment should issue, but should lie in the office for a week: *Re Higg's Mortgage, Goddard v Higg* [1894] WN 73.

4 Ie under the Trustee Act 1925 ss 44, 51: see **TRUSTS** vol 48 (2007 Reissue) PARAS 875-884. As to jurisdiction see PARAS 530-531.

5 See eg *Lechmere v Clamp (No 2)* (1861) 30 Beav 218; *Lechmere v Clamp (No 3)* (1862) 31 Beav 578 (where the mortgagor could not be found); *Jones v Davies* [1940] WN 174 (where the mortgagor refused to convey). See also *Re Crowe's Mortgage* (1871) LR 13 Eq 26; *Re D Jones & Co's Mortgage* (1888) 59 LT 859. Cf *Smith v Boucher* (1852) 1 Sm & G 72. Formerly, the court might make a vesting order in the case of a mortgage by sub-demise of leasehold property which contained a declaration of trust by the mortgagor of his reversion: see *British Empire Mutual Life Assurance Co v Sugden* (1878) 47 LJCh 691, where the court refused to make

such an order until foreclosure absolute. In the case of a mortgage by sub-demise, the leasehold reversion now vests automatically on foreclosure absolute: see PARA 607.

6 le under the Senior Courts Act 1981 s 39(1): see **CIVIL PROCEDURE** vol 12 (2009) PARA 1137. As to the procedure under this provision see *Savage v Norton* [1908] 1 Ch 290; and **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 965. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

7 See *Jones v Davies* [1940] WN 174. As to the power of the court to appoint a person to convey in a case where a vesting order can be made see the Trustee Act 1925 ss 50, 51(2); and **TRUSTS** vol 48 (2007 Reissue) PARAS 879, 884. See also *Foster v Parker* (1878) 8 ChD 147.

8 *Greene v Foster* (1882) 22 ChD 566.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(viii) Foreclosure Absolute/606. Stamp duty land tax.

606. Stamp duty land tax.

An order for foreclosure absolute is a land transaction¹ effected by operation of law, and as such is subject to stamp duty land tax². All such orders are required to be notified to the Commissioners for Her Majesty's Revenue and Customs, by delivery of a land transaction return, before the end of the period of 30 days after the effective date³ of the transaction⁴, and the Commissioners for Her Majesty's Revenue and Customs confirm that stamp duty land tax has been accounted for on the transaction by issuing a return certificate (a 'revenue certificate'), which accompanies the application to the land registry⁵.

1 For the purposes of the Finance Act 2003 Pt 4 (ss 42-124) 'land transaction' means any acquisition of a chargeable interest: see ss 43(1), 48; and **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

2 See the Finance Act 2003 s 42 (which provides that stamp duty land tax is charged on all land transactions whether or not effected by instrument and regardless of the place of execution of the instrument and the residence of any party to the transaction); and **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

3 le the date of completion: see the Finance Act 2003 s 119(1).

4 See the Finance Act 2003 s 76; the Commissioners for Revenue and Customs Act 2005 s 50(1); and **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

5 See the Finance Act 2003 s 79; the Commissioners for Revenue and Customs Act 2005 s 50(1); and **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(viii) Foreclosure Absolute/607. Effect of order absolute.

607. Effect of order absolute.

The mortgagee under a legal mortgage of freehold has a term of years or a legal interest instead of the fee simple estate, and the fee simple is in the mortgagor¹. The vesting of the fee simple in the mortgagee on foreclosure is effected automatically in the case of unregistered land²; the foreclosure order absolute operates to vest the fee simple in the mortgagee, subject to any legal mortgage having priority, and the mortgage term, if any, merges in the fee simple, any subsequent mortgage term or legal charge being extinguished³. This also applies to a sub-mortgage⁴.

A foreclosure order absolute of a leasehold mortgage by sub-demise or legal charge operates, unless it otherwise provides, to vest the nominal reversion and any subsequent mortgage term, subject to any legal mortgage having priority, in the mortgagee, and the mortgage term or legal charge merges in the nominal reversion or is extinguished⁵. This also applies to a sub-mortgage⁶.

In relation to registered land, foreclosure effects a transfer by operation of law of the registered estate⁷ over which the charge was held, and must be completed by registration⁸. The registrar must cancel the registration of the charge in respect of which the foreclosure order was made, cancel all entries in respect of interests over which the charge has priority, and enter the mortgagee as proprietor of the registered estate⁹.

Trustees who have foreclosed mortgaged lands hold them in trust¹⁰. A release of the equity of redemption after default under the order nisi is equivalent to final foreclosure¹¹.

1 See PARAS 190-191.

2 Formerly, the effect of the order for foreclosure absolute was to transfer the mortgagor's equitable estate to the mortgagee and the mortgagor then had no interest in the property: *Heath v Pugh* (1881) 6 QBD 345 at 360, CA; affd (1882) 7 App Cas 235, HL. The mortgagee held the mortgaged property as absolute owner in lieu of the mortgage money, and if it was real estate, he held it as such and not as personalty: *Thompson v Grant* (1819) 4 Madd 438; *Re Loveridge, Pearce v Marsh* [1904] 1 Ch 518 at 523.

3 See the Law of Property Act 1925 s 88(2); and PARA 566.

4 See the Law of Property Act 1925 s 88(5); and PARA 449.

5 See the Law of Property Act 1925 s 89(2).

6 See the Law of Property Act 1925 s 89(5).

7 As to the meaning of 'registered estate' see PARA 159 note 7.

8 See the Land Registration Act 2002 s 27(5); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 914.

9 See the Land Registration Rules 2003, SI 2003/1417, r 112(2)(a)-(c); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 957. See also PARA 608.

10 See the Law of Property Act 1925 s 31(1); and **TRUSTS** vol 48 (2007 Reissue) PARA 1028. As to opening foreclosure see PARA 611 et seq.

11 As to the order nisi see PARA 594 et seq. Formerly, if made by a tenant in tail it bound those in remainder (*Reynoldson v Perkins* (1769) Amb 564), but now the tenant in tail would have the legal estate, and the release would be by conveyance of the legal estate. As to entailed interests see **REAL PROPERTY** vol 39(2) (Reissue) PARA 117 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(viii) Foreclosure Absolute/608. Foreclosure in respect of registered land.

608. Foreclosure in respect of registered land.

Where a mortgagee has foreclosed in respect of registered land and become registered as proprietor of the mortgagor's estate¹, a mortgagor who wishes to redeem must apply for alteration of the register². Alteration cannot be ordered against a proprietor in possession without his consent unless he has by fraud or lack of proper care caused or substantially contributed to the mistake, or it would for any other reason be unjust for the alteration not to be made³.

1 le pursuant to the Land Registration Rules 2003, SI 2003/1417, r 112; see PARA 607.

2 As to alteration of the register see the Land Registration Act 2002 s 65, Sch 4; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 976 et seq.

3 See the Land Registration Act 2002 Sch 4 para 3(1), (2); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 981.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(ix) Costs/609. Costs added to mortgage debt.

(ix) Costs

609. Costs added to mortgage debt.

In foreclosure proceedings the mortgagee's costs are not, in the absence of special circumstances, payable by the mortgagor personally; the mortgagee adds them to his debt, and the mortgagor only pays them if he redeems¹. Moreover, the mortgagee is not liable in general to pay the costs of any other party to the proceedings². A defendant who disclaims interest is, however, entitled to his costs if he has been needlessly made a party to the proceedings, or to costs subsequent to disclaimer if the proceedings are needlessly continued against him³.

1 See PARAS 672, 751 et seq.

2 See PARA 764.

3 See PARA 610.

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610. Rules as to defendant's costs.

On the question of costs in foreclosure proceedings these rules have been recognised:

- 76 (1) if a defendant has no interest¹, and claims no interest, at the commencement of the claim or afterwards, he is not properly made a party². If he disclaims either before or after³ the commencement of the claim in terms which shows this to be the case, he is entitled to his costs against the claimant⁴.
- 77 (2) if a person has an interest, he is *prima facie* a necessary party, but if he disclaims or offers to disclaim before proceedings are brought, and the disclaimer is known to the mortgagee or would have been known had he used ordinary care and prudence⁵, that person ceases to be a necessary party and, if made a defendant, is entitled to his costs against the claimant⁶.
- 78 (3) if a person has an interest, and does not disclaim or offer to disclaim before proceedings are brought, he is properly made a defendant and is not entitled to be paid his costs⁷. If he disclaims during the proceedings and does not ask for costs, but is brought to the trial for some special purpose of the claimant, he is entitled to be paid his costs subsequent to the disclaimer⁸, but not if he appears of his own

accord without being required for such a special purpose⁹ even though he has been served with notice of subsequent proceedings¹⁰. A disclaimer should be made immediately on notice of the claim¹¹, and the defendant must not plead or appear at the hearing to claim costs¹².

1 This includes the case where he has had an interest, but has assigned it before proceedings are brought (*Glover v Rogers* (1847) 11 Jur 1000; *Hurst v Hurst* (1852) 22 LJCh 538), but not the case where he has only agreed to assign his interest (*Roberts v Hughes* (1868) LR 6 Eq 20). As to disclaimer by a trustee who has never acted see *Benbow v Davies* (1848) 11 Beav 369. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq. As to general rules about costs see CPR Pt 44; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1737 et seq.

2 *Furber v Furber* (1862) 30 Beav 523 at 524.

3 *Bellamy v Brickenden* (1858) 4 K & J 670; *Day v Gudgen* (1876) 2 ChD 209.

4 *Ford v Earl of Chesterfield* (1853) 16 Beav 516 (where rules substantially the same as those stated in the text were first enunciated). See also *Tipping v Power* (1842) 1 Hare 405 at 408; *Gabriel v Sturgis* (1846) 5 Hare 97 at 101; *Hiorns v Holtom*, *Fortnam v Holtom* (1852) 16 Jur 1077; *Ward v Shakeshaft* (1860) 1 Drew & Sm 269; *Ridgway v Kynnersley* (1865) 2 Hem & M 565; *Earl of Cork v Russell* (1871) LR 13 Eq 210.

5 See *Ridgway v Kynnersley* (1865) 2 Hem & M 565.

6 *Ford v Earl of Chesterfield* (1853) 16 Beav 516. See also *Thompson v Kendall* (1840) 9 Sim 397; *Lock v Lomas* (1851) 15 Jur 162.

7 *Land v Wood* (1823) 1 LJOS Ch 89; *Grigg v Sturgis* (1846) 5 Hare 93; *Ohrly v Jenkins* (1847) 1 De G & Sm 543; *Buchanan v Greenway* (1848) 11 Beav 58; *Staffurth v Pott* (1848) 2 De G & Sm 571; *Ford v Earl of Chesterfield* (1853) 16 Beav 516; *Furber v Furber* (1862) 30 Beav 523 at 524. See also *Gibson v Nicol* (1846) 9 Beav 403. A statement by the defendant that if he had been applied to before proceedings were brought he would have released or disclaimed his right does not entitle him to costs: *Collins v Shirley* (1830) 1 Russ & M 638; *Ford v White* (1852) 16 Beav 120. Cf *Gurney v Jackson* (1852) 1 Sm & G 97.

8 *Talbot v Kemshead* (1858) 4 K & J 93; *Dillon v Ashwin* (1864) 10 Jur NS 119; *Jones v Rhind*, *Rhind v Jones* (1869) 17 WR 1091 per James V-C; *Greene v Foster* (1882) 22 ChD 566 at 569. See also *Lewin v Jones* (1884) 53 LJCh 1011.

9 *Gowing v Mowberry (Mowbray)* (1863) 11 WR 851, 8 LT 531; *Lewin v Jones* (1884) 53 LJCh 1011.

10 *Clarke v Toleman* (1872) 42 LJCh 23 (disapproving *Davis v Whitmore* (1860) 28 Beav 617).

11 See *Bradley v Borlase* (1858) 7 WR 125.

12 See *Maxwell v Wightwick* (1866) LR 3 Eq 210.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(x) Opening Foreclosure/611. General principle as to enlargement of time.

(x) Opening Foreclosure

611. General principle as to enlargement of time.

Neither an order for foreclosure nisi, which directs foreclosure in the event of non-payment at a prescribed date¹, nor an order for foreclosure absolute², is conclusive as regards the mortgagor's right to redeem³. After an order for foreclosure nisi, whether or not followed by an order for foreclosure absolute, the mortgagor may apply for, and, in suitable circumstances and on certain conditions, obtain, an order enlarging the time for redemption⁴ and, if there has been

foreclosure absolute, opening the foreclosure and giving a new right of redemption⁵; and the same results may follow from acts of the mortgagee.

Enlargement of the time is not a matter of course⁶. It will not be granted in favour of an assignee added as a defendant after judgment nisi⁷. There must be some reason for it, such as that the security is ample, and that the mortgagor has a reasonable probability of obtaining the money to pay the mortgage debt⁸, but on a first application before the day fixed for payment⁹ the reason need not be a strong one¹⁰.

1 See PARA 594.

2 See PARA 603 et seq.

3 As to the mortgagor's right to redeem see PARA 302 et seq.

4 As to enlarging time for redemption in a redemption claim see PARA 669.

5 See *Campbell v Holyland* (1877) 7 ChD 166; *Re Power and Carton's Contract* (1890) 25 LR Ir 459.

6 *Quarles v Knight* (1820) 8 Price 630. As to the circumstances that the court will consider on an application for relief from any sanction imposed for failure to comply with any court order see CPR 3.9; and **CIVIL PROCEDURE** vol 11 (2009) PARA 256.

7 *Re Parbola Ltd, Blackburn v Parbola Ltd* [1909] 2 Ch 437.

8 *Forrest v Shore* (1884) 32 WR 356.

9 *Patch v Ward* (1867) 3 Ch App 203 at 212. See also *Lancashire and Yorkshire Reversionary Interest Co Ltd v Crowe* (1970) 114 Sol Jo 435.

10 *Nanny v Edwards* (1827) 4 Russ 124; *Eyre v Hanson* (1840) 2 Beav 478.

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612. Effect of joint mortgagee's death.

Where under the order for foreclosure and master's order¹ the debt is payable to mortgagees on a joint account, and one of them dies before the day fixed for payment, this operates as a postponement of the time for redemption, and a new day must be appointed².

1 As to the master's order see PARA 596.

2 *Blackburn v Caine* (1856) 22 Beav 614; *Kingsford v Poile* (1859) 8 WR 110. See, however, *Browell v Pledge* [1888] WN 166.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(x) Opening Foreclosure/613. Receipt of rents by mortgagee in possession or receiver.

613. Receipt of rents by mortgagee in possession or receiver.

The time for redemption will be enlarged if the mortgagee is in possession and receives rents between the date of the master's order and the day appointed for payment¹. The receipt reopens the account, and a fresh order must be made and a further day appointed²; in this case, the mortgagor is not put upon terms of paying interest and costs³. A mortgagee is not allowed to reopen the account for the purpose of letting in the costs of other proceedings on the ground of consolidation⁴ but after default on the day appointed for payment the mortgagee receives the rents on his own account and the time is not by that enlarged⁵.

Receipt of rents by a receiver has the same effect as receipt by the mortgagee if the mortgagee claims them, that is, the account is reopened if the rents are received before the day for payment, but not if they are received after that day⁶. The expense of further account may, however, be saved by the mortgagee filing a witness statement or affidavit as to the amount due for principal, interest and costs, after allowing for receipts, down to the day for which notice is given of application to fix another day for redemption⁷. The account is not reopened if in the order nisi the mortgagee submits to be charged with a certain sum in respect of rents in the receiver's hands or which may come into his hands prior to the order absolute, and if the amount received does not exceed that sum⁸, or if the amount received is not sufficient to cover the receiver's expenses and remuneration⁹. This effect is given to the receipt of rents by a receiver on the ground that until default the rents belong to the mortgagor and must be credited to him. It is otherwise where receipts represent capital and in that case they belong to the party redeeming, or, if no person redeems, to the mortgagee foreclosing, and the account is not reopened¹⁰. Accordingly, the judgment should give permission to apply in chambers as to payment of the money¹¹; but the direction giving permission to apply implies that the account is not to be reopened, and it will not be inserted unless the nature of the receipts justifies it¹². Where a receiver omits from his accounts certain rents received, this does not, without proof that the mortgagee received those rents, reopen the foreclosure¹³.

1 See PARA 596.

2 *Geldard v Hornby* (1841) 1 Hare 251; *Garlick v Jackson* (1841) 4 Beav 154; *Alden v Foster* (1842) 5 Beav 592; *Ellis v Griffiths* (1844) 7 Beav 83; *Holford v Yate* (1855) 1 K & J 677; *Patch v Ward* (1867) 3 Ch App 203 at 209; *Prees v Coke* (1871) 6 Ch App 645; *Allen v Edwards* (1873) 42 LJCh 455. The authorities referred to in this paragraph should be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

3 *Buchanan v Greenway* (1849) 12 Beav 355.

4 *Barron v Lancefield* (1853) 17 Beav 208.

5 *Constable v Howick* (1858) 5 Jur NS 331; *Prees v Coke* (1871) 6 Ch App 645; *National Permanent Mutual Benefit Building Society v Raper* [1892] 1 Ch 54. See also *Webster v Patteson* (1884) 25 ChD 626. As to the effect of the rule where successive periods are fixed for redemption see *Bird v Gandy* (1715) 7 Vin Abr 45 pl 20.

6 *Jenner-Fust v Needham* (1886) 32 ChD 582, CA; *Peat v Nicholson* (1886) 54 LT 569. Cases allowing a further month (eg *Hoare v Stephens* (1886) 32 ChD 194; *Ross Improvement Comrs v Usborne* [1890] WN 92) have been overruled (see *National Permanent Mutual Benefit Building Society v Raper* [1892] 1 Ch 54). As to the appointment of a receiver see PARAS 475-484, 560-565.

7 *Jenner-Fust v Needham* (1886) 32 ChD 582, CA.

8 *Barber v Jeckells* [1893] WN 91; *Christy v Godwin* (1893) 38 Sol Jo 10; *Simmons v Blandy* [1897] 1 Ch 19. Cf *Lusk v Sebright* (1894) 71 LT 59.

9 *Ellenor v Ugle* [1895] WN 161.

10 *Welch v National Cycle Works Co Ltd* (1886) 55 LT 673, CA.

11 *Coleman v Llewellyn* (1886) 34 ChD 143, CA; *Smith v Pearman* (1888) 58 LT 720.

12 *Cheston v Wells* [1893] 2 Ch 151. As to takings in the hands of a receiver and manager see *Holt & Co v Beagle* (1886) 55 LT 592.

13 *Ingham v Sutherland* (1890) 63 LT 614.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(x) Opening Foreclosure/614. Effect of proceedings on covenant, or sale under power, or fraud.

614. Effect of proceedings on covenant, or sale under power, or fraud.

An order for foreclosure absolute will be reopened if, after foreclosure, the mortgagee sues the mortgagor on his covenant for payment¹. It will be reopened also if the mortgagee sells under his power of sale and not as absolute owner, although the effect is only to make him liable to account for the surplus proceeds of sale, and the purchaser's title is not disturbed². Further, like any other judgment, the order can be set aside if it has been obtained by fraud³, where, for instance, the mortgagee has misled the court as to the persons interested in the equity of redemption⁴; but mere constructive fraud is not sufficient⁵. The foreclosure may be reopened in a suitable case as against a purchaser⁶, but it is not reopened by sale to a party to the proceedings⁷ or by the mortgagee bequeathing the security as a debt⁸.

1 *Lockhart v Hardy* (1846) 9 Beav 349; *Re Power and Carton's Contract* (1890) 25 LR Ir 459 at 469. See also *Dashwood v Blythway* (1729) 1 Eq Cas Abr 317. See further PARA 514. Where a second mortgagee has been foreclosed, and the mortgagor acquires the estate by devise from the first mortgagee, this may revive the second mortgage: *Cook v Sadler* (1691) 2 Vern 235. See also *Mexborough UDC v Harrison* [1964] 2 All ER 109, [1964] 1 WLR 733. However, where the mortgagee has sold the foreclosed property to a third party he cannot sue the mortgagor or guarantor on the covenant: see *Lloyds and Scottish Trust Ltd v Britten* (1982) 44 P & CR 249, [1982] LS Gaz R 129; and PARA 542.

2 See *Watson v Marston* (1853) 4 De GM & G 230; *Stevens v Theatres Ltd* [1903] 1 Ch 857. Cf *Re Alison, Johnson v Mounsey* (1879) 11 ChD 284, CA.

3 *Loyd v Mansell* (1722) 2 P Wms 73. As to setting aside judgments obtained by fraud see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 836.

4 *Gore v Stacpoole* (1813) 1 Dow 18, HL; *Harvey v Tebbutt* (1820) 1 Jac & W 197.

5 *Patch v Ward* (1867) 3 Ch App 203. As to constructive fraud see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 838 et seq.

6 *Campbell v Holyland* (1877) 7 ChD 166 at 172-173.

7 *Re Power and Carton's Contract* (1890) 25 LR Ir 459.

8 *Tooke v Bishop of Ely* (1705) 5 Bro Paul Cas 181; *Re Power and Carton's Contract* (1890) 25 LR Ir 459 at 470. As to reopening foreclosure when it is contrary to agreement between the parties see *Cox v Peele* (1788) 2 Bro CC 334. As to the bequest of securities as a debt see **WILLS** vol 50 (2005 Reissue) PARA 329.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/9. REMEDIES OF MORTGAGEES/(7) FORECLOSURE/(x) Opening Foreclosure/615. Effect of acquiescence or delay.

615. Effect of acquiescence or delay.

An application to reopen a foreclosure absolute must be made promptly¹. The mortgagor loses his right by acquiescing in the mortgagee's ownership², especially if there have been dealings with or expenditure on the estate³.

1 *Thornhill v Manning* (1851) 1 Sim NS 451 at 454; *Campbell v Holyland* (1877) 7 ChD 166.

2 See *Fleetwood v Jansen* (1742) 2 Atk 467.

3 See *Stuckville v Dolben* (undated) cited in 5 Vin Abr 476 pl 1; *Ord v Smith* (1725) Cas temp King 9. See also **EQUITY** vol 16(2) (Reissue) PARA 909.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(1) ORDER FOR SALE IN MORTGAGE PROCEEDINGS/616. Statutory jurisdiction to order sale.

10. ORDERS FOR SALE

(1) ORDER FOR SALE IN MORTGAGE PROCEEDINGS

616. Statutory jurisdiction to order sale.

In any proceedings, whether for foreclosure¹, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money², the court³ may direct a sale⁴ of the mortgaged property⁵ on the request of the mortgagee or of any person interested either in the mortgage money or the right of redemption⁶, notwithstanding the dissent of any other person⁷, and notwithstanding that the mortgagee or any person so interested does not appear in the proceedings⁸. This provision extends to equitable mortgages and charges⁹. Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in proceedings brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative¹⁰. The sale may be directed without allowing any time for redemption or for payment of any mortgage money, and may be directed on such terms as the court thinks fit, including the deposit in court of a reasonable sum, fixed by the court, to meet the expenses of the sale and to secure performance of the terms¹¹. The court may direct a sale without previously determining the priorities of incumbrancers¹². In favour of a purchaser, the court may make a vesting order conveying the mortgaged property, or appoint a person to do so, subject or not to any incumbrance, as the court may think fit; alternatively, in the case of an equitable mortgage, the court may create and vest a mortgage term in the mortgagee to enable him to carry out the sale as if the mortgage had been made by deed by way of legal mortgage¹³. The court's discretion is unfettered but must be exercised judicially by having due regard to the interests of all concerned¹⁴.

1 As to foreclosure see PARA 566 et seq.

2 See the Law of Property Act 1925 s 91(2). As to the meaning of 'mortgage money' see PARA 104 note 1.

3 As to the jurisdiction of the High Court and county court see PARAS 530-531. As to procedure generally see PARA 532 et seq.

4 See *Twentieth Century Banking Corp'n Ltd v Wilkinson* [1977] Ch 99, [1976] 3 All ER 361.

5 'Mortgaged property' includes the estate or interest which a mortgagee would have had power to convey if the statutory power of sale were applicable: Law of Property Act 1925 s 91(6). As to the meaning of 'mortgagee' see PARA 104 note 1. As to the application of the statutory power of sale see PARA 443.

6 As to the right of the person entitled to redeem to have a sale see further the Law of Property Act 1925 s 91(1); and PARA 671. Thus a person claiming a beneficial interest in the property may apply for a sale: *Halifax Building Society v Stansfield* [1993] EGCS 147, CA. In proceedings by a person interested in the right of

redemption and seeking a sale, the court may, on the application of any defendant, direct the claimant to give security for costs: see PARA 671.

7 See the Law of Property Act 1925 s 91(2)(a).

8 See the Law of Property Act 1925 s 91(2)(b).

9 'Mortgage' is defined as including any charge or lien by the Law of Property Act 1925 s 205(xvi): see PARA 101 note 4. See also *Oldham v Stringer* (1884) 33 WR 251.

10 See the Law of Property Act 1925 s 91(1); CPR 40.16; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215. See also *Woolley v Colman* (1882) 21 ChD 169 (an order can be made even on an interlocutory application). Interlocutory applications are now referred to as interim applications: see CPR Pt 25; and **CIVIL PROCEDURE** vol 11 (2009) PARA 746 et seq.

11 See the Law of Property Act 1925 s 91(2).

12 See the Law of Property Act 1925 s 91(4). Cf s 90(1): see PARA 625. As to the meaning of 'incumbrancer' see PARA 223 note 4.

13 Law of Property Act 1925 s 91(7). Cf s 90(1): see PARA 625.

14 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA; *Arab Bank plc v Merchantile Holdings Ltd* [1994] Ch 71, [1994] 2 All ER 74.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(1) ORDER FOR SALE IN MORTGAGE PROCEEDINGS/617. Order for sale against wishes of mortgagee.

617. Order for sale against wishes of mortgagee.

The court will normally only order a sale at the request of a mortgagor against the wishes of a mortgagee if the court can protect the mortgagee against the loss of his right to repayment of the loan with interest, either by ordering the mortgagor to put up sufficient security to ensure full repayment of the mortgage debt¹, or by imposing a sufficiently high reserve price on the property so as to preclude a sale unless it achieves this result². Where a mortgagee seeks foreclosure, an order for sale will be refused if the security is deficient and the mortgagor's application is based only on a possible rise in value, or where the value of the property is reduced because the mortgagee is a statutory tenant of the property with a right to retain possession after any sale³.

Only in exceptional circumstances will the power be exercised against the mortgagee's wishes when a substantial part of the mortgage debt will remain outstanding following a sale⁴. Accordingly, no order for sale will be made in favour of the mortgagor where the mortgagee is taking active steps to enforce its security by sale⁵ or where a mortgagee can demonstrate a real possibility that a refusal or postponement of a sale would be financially beneficial because of the likely increase in value of the property or because of the extent of the revenue which it would generate in the interim⁶.

Where a mortgagee seeks possession but has no wish to realise his security in the near future, and wishes to retain the property to speculate on an increase in value notwithstanding an income shortfall, the court may order a sale even though the proceeds of sale would be insufficient to discharge the mortgage debt and the mortgagor cannot pay the deficit⁷. However, once the mortgagee has an order for possession and the warrant takes effect the court will not suspend that order to enable the mortgagor to make an application for sale⁸.

1 *Cripps v Wood* (1882) 51 LJCh 584; *Norman v Beaumont* [1893] WN 45. See also *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA.

2 *Woolley v Colman* (1882) 21 ChD 169. See also *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA.

3 See PARA 572.

4 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA.

5 *Cheltenham and Gloucester plc v Krausz* [1997] 1 All ER 21, [1997] 1 WLR 1558, CA.

6 *Palk v Mortgage Services Funding plc* [1993] Ch 330 at 343, [1993] 2 All ER 481 at 491, CA, per Sir Michael Kerr. See, however, *Polonski v Lloyds Bank Mortgages Ltd* [1998] 1 FCR 282, [1998] 1 FLR 896, where an order for sale was made notwithstanding the financial detriment to the mortgagee because the mortgagor wished to move house.

7 *Palk v Mortgage Services Funding plc* [1993] Ch 330, [1993] 2 All ER 481, CA; *Polonski v Lloyds Bank Mortgages Ltd* [1998] 1 FCR 282, [1998] 1 FLR 896. The mortgagee may be given liberty to bid for the property: see *Polonski v Lloyds Bank Mortgages Ltd*.

8 See *Cheltenham and Gloucester plc v Krausz* [1997] 1 All ER 21, [1997] 1 WLR 1558, CA (doubting the correctness of the decision in *Barrett v Halifax Building Society* (1995) 28 HLR 634, [1995] NPC 146, ChD).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(1) ORDER FOR SALE IN MORTGAGE PROCEEDINGS/618. Order for sale in favour of legal mortgagee.

618. Order for sale in favour of legal mortgagee.

The court has jurisdiction¹ to make an order for sale in favour of a legal mortgagee, the effect of which is to render the sale unimpeachable². Such an order will be made only in exceptional circumstances and the mortgagee must make out a proper case that the proposed sale is necessary and that the court must exercise its discretion rather than leave it to the mortgagee to exercise his own power of sale; and the mortgagee must adduce sufficient evidence to enable the court to exercise its jurisdiction³. Such an order may be made where the court is satisfied:

- 79 (1) that the prospects of the mortgagor successfully impeaching the sale are utterly remote;
- 80 (2) that the mortgagor's conduct, during the application as well as before it, justifies the apprehension that he will not hesitate to threaten proceedings against the purchaser if that will spoil the sale; and
- 81 (3) that the mortgagee's fear that the sale will be lost unless an order is obtained is not unreasonable⁴.

1 ie under the Law of Property Act 1925 s 91: see PARAS 570, 616.

2 ie by virtue of the Law of Property Act 1925 s 104(2): see PARA 468.

3 *Arab Bank plc v Merchantile Holdings Ltd* [1994] Ch 71, [1994] 2 All ER 74.

4 See *Arab Bank plc v Merchantile Holdings Ltd* [1994] Ch 71, [1994] 2 All ER 74.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(2) ORDER FOR SALE IN FAVOUR OF CHARGEES OF EQUITABLE INTEREST/619. Statutory jurisdiction to order sale.

(2) ORDER FOR SALE IN FAVOUR OF CHARGEES OF EQUITABLE INTEREST

619. Statutory jurisdiction to order sale.

Any person who has an interest in property subject to a trust of land may apply for an order for the sale of the land¹. Thus an equitable chargee² of the share of a co-owner of land may apply to court for an order for sale³. The court must have regard to the intentions of the person who created the trust, the purposes for which the property is held, the welfare of any child occupying the property as his home, and the interests of any secured creditor of any beneficiary⁴.

A powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue⁵.

Where an application was made before 1997⁶, the interests of creditors would usually prevail over the other beneficiaries of the trust⁷ unless there was a subsisting collateral purpose of the trust other than the provision of a home for the chargor and his spouse⁸. It made no difference that the chargee held a legal charge which was subject to the overriding interest of the other beneficiary⁹. These authorities are still useful but not decisive¹⁰.

1 See the Trusts of Land and Appointment of Trustees Act 1996 s 14; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 67. As to the jurisdiction of the High Court and county courts see PARAS 530-531. As to procedure generally see PARA 532 et seq.

2 This includes the holder of a charging order, which is enforceable in the same manner as an equitable charge created by the debtor by writing under his hand: see the Charging Orders Act 1979 s 3(2); and PARAS 242, 291.

3 *Midland Bank plc v Pike* [1988] 2 All ER 434; *Lloyds Bank plc v Byrne* [1993] 2 FCR 41, [1993] 1 FLR 369, CA.

4 See the Trusts of Land and Appointment of Trustees Act 1996 s 15; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 67.

5 *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 All ER (Comm) 920, [2001] 2 FLR 809; *Mortgage Corp Ltd v Shaire* [2001] Ch 743, [2001] 4 All ER 364; *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch), [2009] 1 FLR 873, [2008] BPIR 1465; *Putnam & Sons v Taylor* [2009] EWHC 317 (Ch), [2009] BPIR 769, [2009] All ER (D) 242 (Mar). The adequacy of the security may justify a postponement of the sale even if no interest is being paid: see *Edwards v Lloyds TSB Bank plc* [2004] EWHC 1745 (Ch), [2005] 1 FCR 139, [2004] BPIR 1190.

6 I.e. under the Law of Property Act 1925 s 30 (repealed) and before the commencement of the Trusts of Land and Appointment of Trustees Act 1996.

7 See *Re Citro (a bankrupt)* [1991] Ch 142, [1990] 3 All ER 952, CA; *Lloyds Bank plc v Byrne* [1993] 2 FCR 41, [1993] 1 FLR 369, CA; *Zandfarid v Bank of Credit and Commerce International SA (in liquidation)* [1996] 1 WLR 1420, [1997] 1 FCR 78; *Bank of Baroda v Dhillon* [1998] 1 FLR 524, 30 HLR 845, CA.

8 *Abbey National plc v Moss* [1994] 1 FLR 307, 26 HLR 249, CA.

9 *Bank of Baroda v Dhillon* [1998] 1 FLR 524, 30 HLR 845, CA.

10 *Mortgage Corp Ltd v Shaire* [2001] Ch 743, [2001] 4 All ER 364.

620. Procedure.

A claim for an order for sale should be made to the court which made the charging order unless that court does not have jurisdiction to order a sale¹. A claim in the High Court must be started in the Chancery Chambers at the Royal Courts of Justice or a Chancery District Registry². The claimant must use the Part 8 procedure³. A copy of the charging order must be filed with the claim form⁴. Sample forms of order are provided in the Civil Procedure Rules⁵.

1 See CPR 73.10(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482. The county court has jurisdiction where the charged judgement debt does not exceed £30,000 (the 'county court limit'): see the County Courts Act 1984 s 23(g); and PARA 530. As to the county court limit see **COURTS** vol 10 (Reissue) PARA 710.

2 See *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.2; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482.

3 See CPR 73.10(3); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482.

4 See CPR 73.10(4); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482.

5 See *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 Appendix A; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(2) ORDER FOR SALE IN FAVOUR OF CHARGEES OF EQUITABLE INTEREST/621. Evidence required for enforcement of charging order by sale.

621. Evidence required for enforcement of charging order by sale.

A witness statement in support of a claim to enforce a charging order by sale of the property charged¹ must:

- 82 (1) identify the charging order sought to be enforced and the property sought to be sold²;
- 83 (2) specify the amount in respect of which the charge was imposed and the balance outstanding at the date of issue of the claim³;
- 84 (3) verify, so far as known, the debtor's title to the property charged⁴;
- 85 (4) state, so far as the claimant is able to identify, the names and addresses of any other creditors who have a prior charge or other security over the property and the amount owed to each such creditor⁵;
- 86 (5) give an estimate of the price which would be obtained on a sale of the property⁶; and
- 87 (6) if the claim relates to land, give details of every person who to the best of the claimant's knowledge is in possession of the property charged or any part of it⁷; and, in the case of residential property, state certain information⁸.

1 See *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1482.

2 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(1).

3 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(2).

4 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(3).

5 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(4).

6 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(5).

7 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(6).

8 See *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(7). The information to be stated is whether a Class F land charge or a notice under the Family Law Act 1996 s 31(10) (**MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 286), or under any provision of an Act which preceded that section, has been registered, and, if so, on whose behalf; and that the claimant will serve notice of the claim on that person: see *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3(7)(a), (b). As to Class F land charges see **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(3) ORDER FOR SALE IN PROCEEDINGS RELATING TO LAND/622. Jurisdiction to order sale.

(3) ORDER FOR SALE IN PROCEEDINGS RELATING TO LAND

622. Jurisdiction to order sale.

In any proceedings relating to any land¹, the court may order that land or part of it to be sold².

1 For these purposes, 'land' includes any interest in, or right over, land: see CPR 40.15(2).

2 See CPR 40.16; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1215-1216. As to the mode of carrying out the sale see PARA 624 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(4) SALE OF LAND BELONGING TO BANKRUPT/623. Statutory jurisdiction to order sale.

(4) SALE OF LAND BELONGING TO BANKRUPT

623. Statutory jurisdiction to order sale.

The trustee in bankruptcy of a person who has an interest in property subject to a trust of land may apply for an order for the sale of the land¹. On such an application the court will make such order as it thinks just and reasonable having regard to:

- 88 (1) the interests of the bankrupt's creditors²;
- 89 (2) in certain circumstances, the conduct of the spouse or civil partner or former spouse or civil partner, so far as contributing to the bankruptcy, and his or her needs and financial resources;
- 90 (3) the needs of the children; and
- 91 (4) all the circumstances of the case other than the needs of the bankrupt³.

Where such an application is made after the end of one year from the date of the first vesting of the bankrupt's estate in a trustee, the court will assume, unless the circumstances are exceptional⁴, that the interests of the bankrupt's creditors outweigh all other considerations⁵. It is an abuse of process for the trustee to make such an application for the sole benefit of a secured creditor who could himself make an application for sale⁶.

Any person claiming to be the legal or equitable mortgagee of land belonging to the bankrupt may apply to the court for an order that the land be sold⁷. The proceeds of sale go first to pay the costs and expenses of the trustee of and occasioned by the application to the court and the sale and attendance at court, and then in payment of the principal, interest and costs of the mortgagee; if there is any balance, it is to be retained by or paid to the trustee⁸. If the proceeds are insufficient to pay the amount due to the mortgagee, he is entitled to prove for the deficiency as a creditor⁹.

1 See PARA 619. As to the procedure for such a sale see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

2 'Creditors' means both secured and unsecured creditors: see *Judd v Brown* [1998] 2 FLR 360, [1998] Fam Law 514. The bankrupt's creditors have an interest in an order for sale even if the proceeds of sale are only sufficient to discharge bankruptcy expenses: *Eric Bowe (Trustee) v Bowe* [1998] 2 FLR 439, [1998] Fam Law 515.

3 See the Insolvency Act 1986 s 335A(2) (s 335A added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 23; Insolvency Act 1986 s 335A(2) amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 118); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 647.

4 As to what constitutes exceptional circumstances see *Judd v Brown* [1998] 2 FLR 360, [1998] Fam Law 514; *Eric Bowe (Trustee) v Bowe* [1998] 2 FLR 439, [1998] Fam Law 515; *Re Raval* [1998] 2 FLR 718, [1998] Fam Law 590. As to the effect of the Human Rights Act 1998 s 1, Sch 1 Pt I art 8 (right to respect for private and family life) see *Barca v Mears* [2004] EWHC 2170 (Ch), [2005] 2 FLR 1, [2005] BPIR 15.

5 See the Insolvency Act 1986 s 335A(3) (as added: see note 3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 647.

6 *Re Ng (a bankrupt), Ng v Ng (trustee)* [1998] 2 FLR 386, [1998] Fam Law 515; *Judd v Brown* [1998] 2 FLR 360, [1998] Fam Law 514.

7 See the Insolvency Rules 1986, SI 1986/1925, r 6.197; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

8 See the Insolvency Rules 1986, SI 1986/1925, r 6.199(1)(a), (b); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

9 See the Insolvency Rules 1986, SI 1986/1925, r 6.199(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 415.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(5) PROCEDURE FOR CARRYING OUT ORDER FOR SALE/624. Conduct of sale.

(5) PROCEDURE FOR CARRYING OUT ORDER FOR SALE

624. Conduct of sale.

Where the court has made an order for sale¹, it may give any other directions it considers appropriate for giving effect to the order².

Where a sale has been directed by the court, any party who wishes to bid should, before the sale, apply to the court for permission to do so; and if all parties are given permission to bid, the conduct of the sale may be given to an independent person, usually a solicitor³.

The conduct of the sale is often given to the mortgagor if the sale is likely to produce a surplus for him, as it is in his interest to secure the best price for the property⁴, and, as he will be liable for the expenses of the sale, it is not necessary to require him to give security for them⁵. There is, however, no general rule that the conduct of the sale will be given to the mortgagor or a

subsequent incumbrancer⁶. Where the proceeds of sale are unlikely to be sufficient to discharge the debts secured over it, conduct of the sale should normally be given to the mortgagee⁷. The parties having the conduct of the sale are not chargeable with any impropriety in connection with the sale on the part of other persons in which they are not implicated⁸.

1 As to the jurisdiction to make such an order see PARA 622.

2 See *Practice Direction--Court's Powers in Relation to Land* PD 40D para 2; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

3 See *Practice Direction--Court's Powers in Relation to Land* PD 40D para 3; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

4 *Cheltenham and Gloucester plc v Krausz* [1997] 1 All ER 21, [1997] 1 WLR 1558, CA.

5 *Davies v Wright* (1886) 32 ChD 220. See also *Manchester and Salford Bank v Scowcroft* (1883) 27 Sol Jo 517; *Woolley v Colman* (1882) 21 ChD 169.

6 *Christy v Van Tromp* [1886] WN 111. As to the court's power, in proceedings by the person interested in the right of redemption, on the defendant's application to give conduct of the sale to the defendant and to give directions as to costs see PARA 668.

7 *Cheltenham and Gloucester plc v Krausz* [1997] 1 All ER 21, [1997] 1 WLR 1558, CA.

8 *Union Bank of London v Munster* (1887) 37 ChD 51.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(5) PROCEDURE FOR CARRYING OUT ORDER FOR SALE/625. Form of order for sale by equitable mortgagee or chargee.

625. Form of order for sale by equitable mortgagee or chargee.

Where the security is an equitable charge¹, the order for sale declares the charge, directs an account² and gives the mortgagor the opportunity to redeem. If he does so, the deeds are to be handed back to him; in default, the direction for sale follows³. Where an order for sale is made by the court in reference to an equitable mortgage⁴ on land⁵ not secured by a legal term of years absolute or by a charge by way of legal mortgage, the court may, in favour of a purchaser, make a vesting order conveying the land or may appoint a person to convey the land or create and vest in the mortgagee⁶ a legal term of years absolute to enable him to carry out the sale, as the case may require, in like manner as if the mortgage had been created by deed by way of legal mortgage, but without prejudice to prior incumbrancers⁷ unless they consent to the sale⁸.

1 As to equitable mortgages and charges see PARA 238 et seq.

2 As to the appropriate accounts see PARAS 592-593.

3 As to the premises comprised in the sale see *Simmons v Montague* [1909] 1 IR 87.

4 As to the meaning of 'mortgage' see PARA 101 note 4.

5 As to the meaning of 'land' see PARA 104 note 2.

6 As to the meaning of 'mortgagee' see PARA 104 note 1.

7 As to the meaning of 'incumbrancer' see PARA 223 note 4.

8 See the Law of Property Act 1925 s 90(1). This provision applies to equitable mortgages, but not to a mortgage which has been overreached under the powers conferred by the Law of Property Act 1925 or otherwise: see s 90(2). As to the power to make vesting orders, appoint persons to convey, and create mortgage terms see s 91(7); and PARA 616. As to the jurisdiction of county courts see PARAS 530-531. See also the Trustee Act 1925 s 47; and **TRUSTS** vol 48 (2007 Reissue) PARA 882.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(5) PROCEDURE FOR CARRYING OUT ORDER FOR SALE/626. Procedure to provide for sale free from incumbrances.

626. Procedure to provide for sale free from incumbrances.

If the land to be sold is subject to any incumbrance, the court may¹ direct that a sum (sufficient to provide for the incumbrance and for further costs and expenses) be paid into court². The land may then be sold free from the incumbrance³.

1 See on an application under the Law of Property Act 1925 s 50 (see PARA 462): see *Practice Direction--Court's Powers in Relation to Land* PD 40D para 1.2; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215. Any application under the Law of Property Act 1925 s 50 should, if made in existing proceedings, be made in accordance with CPR Pt 23, otherwise by claim form under CPR Pt 8: see *Practice Direction--Court's Powers in Relation to Land* PD 40D para 1.5; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

2 *Practice Direction--Court's Powers in Relation to Land* PD 40D para 1.3; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

3 See the Law of Property Act 1925 s 50(2); and PARA 462. See also *Practice Direction--Court's Powers in Relation to Land* PD 40D para 1.4; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(5) PROCEDURE FOR CARRYING OUT ORDER FOR SALE/627. Certifying sale result.

627. Certifying sale result.

If: (1) the court has directed the purchase money to be paid into court; or (2) the court has directed that the result of the sale be certified, the result of the sale is to be certified by the person having conduct of the sale¹. Unless the court directs otherwise, the certificate must give details of:

- 92 (a) the amount of the purchase price;
- 93 (b) the amount of the fees and expenses payable to any auctioneer or estate agent²;
- 94 (c) the amount of any other expenses of the sale;
- 95 (d) the net amount received in respect of the sale,

and must be verified by a statement of truth³. The certificate must be filed: (i) if the proceedings are being dealt with in the Royal Courts of Justice, in Chancery Chambers; (ii) if the proceedings are being dealt with anywhere else, in the court where the proceedings are being dealt with⁴.

1 *Practice Direction--Court's Powers in Relation to Land* PD 40D para 4.1; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

2 As to the estate agent and auctioneer's fees and expenses which may be claimed see *Practice Direction--Court's Powers in Relation to Land* PD 40D para 5; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

3 *Practice Direction--Court's Powers in Relation to Land* PD 40D para 4.2; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

4 *Practice Direction--Court's Powers in Relation to Land* PD 40D para 4.3; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/10. ORDERS FOR SALE/(5) PROCEDURE FOR CARRYING OUT ORDER FOR SALE/628. Order for possession.

628. Order for possession.

Where the court has made an order for sale it may order any party to deliver up to the purchaser or any other person possession of the land, receipt of rents or profits relating to it, or both¹. In order to protect the position of other co-owners as far as possible, it is not usual to order possession until necessary to effect the sale².

1 See CPR 40.17; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1215. As to proceedings for possession see PARA 546 et seq.

2 As to when possession is necessary see *Cheltenham and Gloucester plc v Booker* (1997) 73 P & CR 412, 29 HLR 597, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(1) BURDEN OF DISCHARGE/(i) Where Several Persons or Properties Liable/A. IN GENERAL/629. Liability where several mortgagors.

11. DISCHARGE OF MORTGAGES

(1) BURDEN OF DISCHARGE

(i) Where Several Persons or Properties Liable

A. IN GENERAL

629. Liability where several mortgagors.

Mortgagors may either agree between themselves¹ who is to be responsible for repayment², or such an agreement may be inferred³. If they have had the benefit of the money in specific shares, or for the purpose of a joint adventure, they must contribute to the repayment of the debt in the proportions of their shares in the mortgage money⁴, or in the joint adventure⁵. Alternatively, one may have had the exclusive benefit of it, so as to be the principal debtor, while the others are sureties⁶, in which case the sureties are entitled to be exonerated by the principal debtor⁷, save in respect of advances applied for their joint benefit⁸, and, as between themselves, they must contribute equally to the debt unless it has been otherwise agreed⁹.

Where one mortgagor has paid more than his share of the mortgage debt or instalments, he is entitled to be credited with the amount he has paid in respect of the mortgagor's liability

before division of the proceeds of sale, although where the other mortgagor has been excluded from the property he may be debited with an occupation rent¹⁰.

1 Where there are several mortgagors the mortgage may, depending on its construction, secure either joint or several liabilities of any of the mortgagors, and mortgagors may be jointly and severally liable: see *AIB Group (UK) plc (formerly Allied Irish Banks plc and AIB Finance Ltd) v Martin* [2001] UKHL 63, [2002] 1 All ER 353; and PARA 213.

2 *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA; *Huntingford v Hobbs* (1992) 24 HLR 652, [1992] NPC 39, CA.

3 *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Re Pittortou (a bankrupt), ex p the Trustee of the Property of the Bankrupt v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58. See also note 1.

4 As to apportionment of a charge between joint tenants or tenants in common see *Re Rushton (a bankrupt), ex p National Westminster Bank Ltd v Official Receiver* [1972] Ch 197, [1971] 2 All ER 937. Oral evidence is admissible to show for whose benefit the money was advanced: *Gray v Dowman* (1858) 27 LJCh 702.

5 As to joint adventure see eg **PARTNERSHIP** vol 79 (2008) PARA 12.

6 See PARA 146 et seq.

7 As to a surety's right to the transfer of the mortgage on payment by him of the debt see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1142; and as to a surety's right against the principal debtor see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1147 et seq.

8 *Re Pittortou (a bankrupt), ex p the Trustee of the Property of the Bankrupt v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58.

9 As to a surety's right to contribution see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1165-1176; and as to rights to securities held by a creditor or co-surety see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1177-1179.

10 *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Re Gorman (a bankrupt), ex p the Trustee of the Bankrupt v Bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616; *Re Pavlou (a bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046; *Byford v Butler* [2003] EWHC 1267 (Ch), [2004] 1 P & CR 159, [2004] 1 FLR 56. In some cases the occupation rent is set off against the interest element of the repayments to save the expense of an account: see eg *Sutill v Graham* [1977] 3 All ER 1117, [1977] 1 WLR 819, CA; *Brassford v Patel* [2007] BPIR 1049, [2007] All ER (D) 256 (Feb). See also **REAL PROPERTY** vol 39(2) (Reissue) PARA 197.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(1) BURDEN OF DISCHARGE/(i) Where Several Persons or Properties Liable/A. IN GENERAL/630. Liability on mortgagor's death.

630. Liability on mortgagor's death.

On the mortgagor's death the mortgagee may pursue his rights and remedies against the mortgagor's estate¹. As between the persons interested in the mortgaged property and those interested in the general personal estate, the mortgaged property is, unless the deceased has signified a contrary intention, primarily liable to bear the debt². This principle does not apply if the mortgagor is a surety only, and the debt is paid off by the principal debtor after his death³.

1 See PARAS 393 et seq, 514 et seq.

2 See the Administration of Estates Act 1925 s 35; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 424-426. Written evidence that a testator had intended that the mortgage be repaid by another means, such as an insurance policy or endowment, may be sufficient to establish a 'contrary or other intention': see *Ross v Perrin-Hughes* [2004] EWHC 2559 (Ch), 7 ITELR 405, [2004] All ER (D) 159 (Nov). See also *Re Biss, Heasman v Biss* [1956] Ch 243, [1956] 1 All ER 89 (property comprised in residuary devise).

3 See *Re Hawkes, Reeve v Hawkes* [1912] 2 Ch 251 at 255. As to a mortgage of a wife's property to secure the husband's debt see *Hall v Hall* [1911] 1 Ch 487; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 239-244. As to the discharge of guarantees see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1189 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(1) BURDEN OF DISCHARGE/(i) Where Several Persons or Properties Liable/A. IN GENERAL/631. Where several properties liable.

631. Where several properties liable.

Where several properties of the same mortgagor which have been charged with a single debt become severed in title, they must, as between themselves, bear the mortgage debt rateably in proportion to their respective values¹ unless, by special agreement in the mortgage itself or by declaration on the mortgagor's part, one property has been made liable to bear the whole debt in exoneration of the others². The rule does not apply where one property is subject to a specific charge and the other to a general lien for the debt³; but it applies as between real and personal property charged with the same debt⁴, and it applies where additional properties are brought into the security on the occasion of further advances⁵. Property which is only charged in aid of the property in the primary security is entitled to exoneration⁶, but property described in a mortgage as a collateral security is not necessarily a secondary security so as to be entitled to be exonerated⁷.

1 See *Ker v Ker* (1869) 4 IR Eq 15 at 25, CA; *Re Darby's Estate, Rendall v Darby* [1907] 2 Ch 465; and cf *Galton v Hancock* (1742) 2 Atk 424 at 426.

2 *Marquis of Bute v Cunynghame* (1826) 2 Russ 275 at 299; *Leonino v Leonino* (1879) 10 ChD 460 at 465; *Re Dunlop, Dunlop v Dunlop* (1882) 21 ChD 583 at 588 (on appeal 21 ChD 583 at 592, CA). As to exoneration see PARAS 636-638.

3 *Re Dunlop, Dunlop v Dunlop* (1882) 21 ChD 583, CA.

4 *Lipscomb v Lipscomb* (1868) LR 7 Eq 501 (and as to this case see *Leonino v Leonino* (1879) 10 ChD 460 at 465-466); *Trestrail v Mason* (1878) 7 ChD 655.

5 *Leonino v Leonino* (1879) 10 ChD 460.

6 *Stringer v Harper* (1858) 26 Beav 33.

7 *Early v Early* (1878) 16 ChD 214n; *Re Athill, Athill v Athill* (1880) 16 ChD 211, CA; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1013.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(1) BURDEN OF DISCHARGE/(i) Where Several Persons or Properties Liable/B. MARSHALLING OF ASSETS/632. Application of marshalling to mortgages.

B. MARSHALLING OF ASSETS

632. Application of marshalling to mortgages.

The doctrine of marshalling applies to the case of securities, whether mortgages, charges or liens, so as to prevent one claimant arbitrarily depriving another of his only security¹. The doctrine applies where one creditor has a charge or lien on two funds and another has a charge

or lien on only one of the funds, although if the double creditor has merely a right of set-off against the second fund, he cannot be required to abandon his charge on the first fund in favour of the second incumbrance on that fund and rely on his right of set-off². If, however, one incumbrancer has a security on two properties of the same mortgagor, and another mortgagee has a security on one property only, the two properties will be marshalled, so as to throw the first incumbrance as far as possible on the property not included in the second security³. The securities need not have been created at the same time, and may be successive securities for the same debt⁴. There must, however, normally be two funds or securities, both originally the same owner's property⁵. Possibly there may be cases where the two securities have not been actually subject to the same ownership, but at least the owners of the security against which the claim is made must not be entitled to throw the paramount liability on the claimant's security⁶. A fund and a right of action are not marshalled⁷; and the debts must be the same person's debts⁸.

The doctrine of marshalling does not entitle the single creditor to interfere with the double creditor's right to resort to whichever security he chooses⁹ but, if the double creditor satisfies his incumbrance out of the property included in the single creditor's security, the single creditor is subrogated to the double creditor's rights against the other security¹⁰.

The doctrine of marshalling will be applied if at any time during the proceedings the court sees occasion for it, even if marshalling has not been claimed by the statements of case¹¹.

1 For the general principle of marshalling see **EQUITY** vol 16(2) (Reissue) PARAS 758-763; and see *Galton v Hancock* (1742) 2 Atk 424 at 427, 430, 435, 438; *A-G v Tyndall* (1764) Amb 614 at 615; *Averall v Wade* (1835) L & G temp Sugd 252, 262.

2 *Webb v Smith* (1885) 30 ChD 192, CA.

3 *Lanoy v Duke of Athol* (1742) 2 Atk 444 at 446; *Gibson v Seagrim* (1855) 20 Beav 614; *Victoria and Grey Trust Co v Brewer* [1970] 3 OR 704, 14 DLR (3d) 28. See also **EQUITY** vol 16(2) (Reissue) PARA 760.

4 *Gwynne v Edwards* (1825) 2 Russ 289n.

5 *Douglas v Cooksey* (1868) 2 IR Eq 311; *The Chioggia* [1898] P 1.

6 See *Douglas v Cooksey* (1868) 2 IR Eq 311.

7 *The Arab* (1859) 5 Jur NS 417.

8 *Re Dawes, ex p Kendall* (1811) 17 Ves 514 at 520; *M'Carthy v M'Cartie (No 2)* [1904] 1 IR 100 at 115, CA; cf *Re Jones (a minor)* (1853) 2 L Ch R 544.

9 *Wallis v Woodyear* (1855) 2 Jur NS 179 at 180; *Noyes v Pollock* (1886) 32 ChD 53 at 70, CA; *Manks v Whiteley* [1911] 2 Ch 448 at 466 (on appeal but not affecting this point [1912] 1 Ch 735, CA, sub nom *Whiteley v Delaney* [1914] AC 132, HL). See also **EQUITY** vol 16(2) (Reissue) PARA 758. The contrary dictum in *Lawrance v Galsworthy* (1857) 3 Jur NS 1049 is erroneous.

10 See eg *Aldrich v Cooper* (1803) 8 Ves 382 at 395-397; *Noyes v Pollock* (1886) 32 Ch D 53 at 70, CA.

11 See CPR 16.2(5); and **CIVIL PROCEDURE** vol 11 (2009) PARA 585. See also *Gibbs v Ougier* (1806) 12 Ves 413 at 416. See further the Senior Courts Act 1981 s 49(2); and **EQUITY** vol 16(2) (Reissue) PARA 499. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

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633. In whose favour marshalling applies.

The doctrine of marshalling¹ applies in favour of persons claiming one of the properties subject to the double creditor's charge, whether they claim by assignment or charge by the mortgagor for value as in a case where they are mortgagees², or claim as volunteers under a settlement made by the mortgagor³. Hence, where settled and unsettled estates are comprised in the mortgage, the mortgage will be thrown as far as possible on the unsettled estate, although not as against a subsequent mortgagee, unless the settlement contains a covenant against incumbrances or the mortgage is made subject to it so that the settled property is entitled to be exonerated⁴. The doctrine does not, however, apply in favour of the mortgagor himself or in favour of persons claiming under him otherwise than by assignment or charge, that is, his trustee in bankruptcy, his judgment creditors⁵ unless they have by judgment a charge on the estate⁶, his unsecured creditors⁷ or his personal representatives.

A surety who has given his property as security for a debt may require the creditor to resort to the debtor's other property comprised in the security in order to exonerate the surety's property⁸ or to marshal securities in the surety's favour⁹. Where an agent has pledged property, on which his principal has a lien, with property of his own as security for his own debt, the principal is entitled to have the debt thrown on the agent's property¹⁰.

1 As to the application of marshalling to mortgages see PARA 632.

2 *Aldrich v Cooper* (1803) 8 Ves 382 at 395-396.

3 *Hales v Cox* (1863) 32 Beav 118; *Anstey v Newman* (1870) 39 LJCh 769; *Mallott v Wilson* [1903] 2 Ch 494.

4 *Re Roche's Estate* (1890) 25 LR Ir 284, Ir CA; *Re Lysaght's Estate* [1903] 1 IR 235. See also PARAS 634 note 11, 635; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 875.

5 See *Averall v Wade* (1835) L & G temp Sugd 252, 262.

6 *Re Fox* (1856) 5 I Ch R 541 PC.

7 *Anstey v Newman* (1870) 39 LJCh 769.

8 *Re Westzinthus* (1833) 5 B & Ad 817. See also *Spalding v Ruding* (1843) 6 Beav 376; *Kemp v Falk* (1882) 7 App Cas 573, HL; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1135.

9 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1136, 1139.

10 *Broadbent v Barlow* (1861) 3 De GF & J 570; *Re Holland, ex p Alston* (1868) 4 Ch App 168. As to marshalling securities given by a partnership firm and also by one of the partners separately see *Re Stratton, ex p Salting* (1883) 25 ChD 148, CA. See also *Re Burge, Woodall & Co, ex p Skyrme* [1912] 1 KB 393, where relief analogous to marshalling was granted.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(1) BURDEN OF DISCHARGE/(i) Where Several Persons or Properties Liable/B. MARSHALLING OF ASSETS/634. Against whom marshalling applies.

634. Against whom marshalling applies.

The doctrine of marshalling¹ applies against the owner of the two properties, if the mortgage or charge on both was created by himself; and it applies against persons claiming the property, or part of it, under him otherwise than by actual assignment or charge, that is, it applies against the mortgagor's trustee in bankruptcy², against his judgment creditors³, and against his personal representatives⁴. The right to marshal exists notwithstanding that the two estates or funds have become vested by devolution in different persons⁵. The right to marshal may apply in favour of a second mortgagee against a surety of the first mortgagee⁶; and it applies against the mortgagor's wife who has charged her own property for the prior debt⁷. The doctrine does

not, however, otherwise apply to the prejudice of third persons' rights⁸; and it does not apply, therefore, against persons claiming part of the property by assignment or charge, whether for value⁹ or as volunteers¹⁰, unless the assignment or charge was made at a time when the other part had already been disposed of with a right of exoneration against the double creditor's mortgage as, for example, where the assignment of the part first disposed of contained a covenant against incumbrances¹¹.

1 As to the application of marshalling to mortgages see PARA 632.

2 *Baldwin v Belcher, Re Cornwall* (1842) 3 Dr & War 173; *Re Tristram, ex p Hartley* (1835) 1 Deac 288; *Re Holland, ex p Alston* (1868) 4 Ch App 168; *Heyman v Dubois* (1871) LR 13 Eq 158.

3 *Gray v Stone and Funnell* (1893) 69 LT 282.

4 *Flint v Howard* [1893] 2 Ch 54 at 73, CA. The right to marshal existed against the heir: see *Lanoy v Duke of Athol* (1742) 2 Atk 444 at 446.

5 *Lanoy v Duke of Athol* (1742) 2 Atk 444.

6 See *South v Bloxam* (1865) 2 Hem & M 457. See also **EQUITY** vol 16(2) (Reissue) PARA 759; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1143.

7 *Tidd v Lister* (1853) 3 De GM & G 857.

8 *Webb v Smith* (1885) 30 ChD 192 at 202, CA; *Aldrich v Cooper* (1803) 8 Ves 382 at 391; *Averall v Wade* (1835) L & G temp Sugd 252, 262 at 258; *Flint v Howard* [1893] 2 Ch 54 at 73, CA; *The Chioggia* [1898] P 1 at 6; cf *Douglas v Cooksey* (1868) 2 IR Eq 311. See also **EQUITY** vol 16(2) (Reissue) PARA 759.

9 *Barnes v Racster* (1842) 1 Y & C Ch Cas 401; *Flint v Howard* [1893] 2 Ch 54 at 73, CA.

10 *Dolphin v Aylward* (1870) LR 4 HL 486 at 501; cf *Mallott v Wilson* [1903] 2 Ch 494. See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 875.

11 See the cases cited in PARA 637 notes 5-7. The decisions in *Finch v Shaw*, *Colyer v Finch* (1854) 19 Beav 500 (affd sub nom *Colyer v Finch* (1856) 5 HL Cas 905 at 922) and *Haynes v Forshaw* (1853) 11 Hare 93 suggest that subsequent alienation of another part is necessarily subject to the right of marshalling, but this is inconsistent with *Barnes v Racster* (1842) 1 Y & C Ch Cas 401 and other cases cited in PARA 635 note 2.

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635. Illustration of application of marshalling.

Where two properties are mortgaged to A, and then one of them is mortgaged to B, and afterwards the other to C, there is no right of marshalling¹ in favour of B against C, so as to throw the whole of the first mortgage on C's security, notwithstanding that C took with notice of the prior mortgages. As between B and C, however, the first mortgage is apportioned between the two properties according to their value², unless C's mortgage is expressed to be subject to and after satisfaction of both the previous mortgages in which case B can marshal against him³, or unless the mortgage to B was made on the footing that it was a first mortgage and the mortgage to C is subsequent in date. In the last case C takes subject to B's right to exoneration out of the property retained by the mortgagor⁴.

1 As to the application of marshalling to mortgages see PARA 632.

2 *Barnes v Racster* (1842) 1 Y & C Ch Cas 401; *Bugden v Bignold* (1843) 2 Y & C Ch Cas 377; *Moxon v Berkeley Mutual Benefit Building Society* (1890) 59 LJCh 524; *Flint v Howard* [1893] 2 Ch 54, CA; *Baglioni v Cavalli* (1900) 83 LT 500; *Smyth v Toms* [1918] 1 IR 338 (differing from *Re Archer's Estate* [1914] 1 IR 285, where marshalling in the second mortgagee's favour was allowed). See also **EQUITY** vol 16(2) (Reissue) PARA 760.

3 *Re Mower's Trusts* (1869) LR 8 Eq 110; *Aldridge v Forbes* (1839) 4 Jur 20; cf *Re Lysaght's Estate* [1903] 1 IR 235.

4 *Tighe v Dolphin* [1906] 1 IR 305. As to exoneration see PARA 636.

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C. EXONERATION

636. Nature of exoneration.

The application of the doctrine of marshalling often has the effect of giving an incumbrancer a claim against a fund not comprised in his security in substitution for his claim against a fund comprised in it, but of the benefit of which he is deprived by the overriding claim of an incumbrancer on both funds¹. The same principle is, however, applied in cases where the person entitled to one fund or property claims, against the person entitled to the other fund or property, either complete exoneration or indemnity from or against the overriding charge, or contribution towards the charge². Whether such a claim will be allowed depends on whether the owner of the two properties prior to their severance was himself the creator of the first charge on both, or whether that charge was paramount to his title; and also on whether, upon the severance of title, he gave the part alienated or charged a right of exoneration by the part retained³.

1 See PARA 632.

2 See PARA 637.

3 See PARA 638.

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637. Assignment of part of property by mortgagor.

If the owner of two properties has mortgaged both and assigned one of them, whether for value or not, without reference to the mortgage on both¹, and he or his representatives pay it off, there is no right of contribution in his or their favour against the assignee²; but where the mortgagor assigns part of the mortgaged property by an assignment which is expressly made subject to the mortgage, there is a right of contribution between the property assigned and that retained³. If, in a case where the mortgagor has no right of contribution, the mortgagee enforces the debt against the assignee, the assignee is entitled to be exonerated out of the property retained by the mortgagor⁴; and where the assignment contains a covenant against incumbrances or for further assurance⁵, or where it is taken upon a representation, even if only

oral, that the estate is free from incumbrances⁶, this gives the assignee an equity to exoneration or marshalling which will prevail against a subsequent purchaser of the other property who does not take the legal estate for value and without notice⁷.

1 *Re Repington, Wodehouse v Scobell* [1904] 1 Ch 811.

2 *Re Darby's Estate, Rendall v Darby* [1907] 2 Ch 465. See also *Ker v Ker* (1869) 4 IR Eq 15, CA; *Hollinshead v Devane* (1914) 49 ILT 87.

3 *Re Mainwaring, Mainwaring v Verden* [1937] Ch 96, [1936] 3 All ER 540, CA.

4 *Re Best, Parker v Best* [1924] 1 Ch 42.

5 *Averall v Wade* (1835) L & G temp Sugd 252, 262; *Hughes v Williams* (1852) 3 Mac & G 683; *Chappell v Rees* (1852) 1 De GM & G 393; *Re Roddy's Estate, ex p Fitzgerald* (1861) 11 I Ch R 369; *Re Roche's Estate* (1890) 25 LR Ir 284, Ir CA; *Re Jones, Farrington v Forrester* [1893] 2 Ch 461 at 470. In a voluntary settlement a covenant for further assurance does not have this effect: *Ker v Ker* (1869) 4 IR Eq 15, CA.

6 *Tighe v Dolphin* [1906] 1 IR 305. As to an erroneous recital that the prior incumbrance has been paid see *Stronge v Hawkes* (1859) 4 De G & J 632.

7 *M'Carthy v M'Cartie (No 2)* [1904] 1 IR 100 at 115, CA. See also *Finch v Shaw, Colyer v Finch* (1854) 19 Beav 500 (on appeal sub nom *Colyer v Finch* (1856) 5 HL Cas 905); *Re Chute's Estate* [1914] 1 IR 180.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(1) BURDEN OF DISCHARGE/(i) Where Several Persons or Properties Liable/C. EXONERATION/638. Assignment of part of property subject to paramount charge.

638. Assignment of part of property subject to paramount charge.

If the owner of the two properties at the time of severance was not the creator of the prior charge, but that charge is paramount to his title, then he can claim the benefit of the rule of equality as between himself and his assignee, whether for value or not; and if he or his representatives pay off the first mortgage, the assignee must contribute¹. It is otherwise if the assignor has on the assignment attached to the property assigned a right of exoneration, in which case the assignee is entitled to the benefit of marshalling against the property retained until it comes to a purchaser for value without notice who obtains the legal estate².

1 *Ker v Ker* (1869) 4 IR Eq 15, CA, as explained in *Re Darby's Estate, Rendall v Darby* [1907] 2 Ch 465.

2 *Ocean Accident and Guarantee Corp'n Ltd and Hewitt v Collum* [1913] 1 IR 337; and see PARA 637.

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(ii) What Constitutes a Good Discharge of Debt

639. Discharge by payment.

Any person may redeem who is beneficially interested in the equity of redemption or liable to pay the mortgage debt¹. The mortgage debt may be discharged by payment to the mortgagee², or to a person authorised to receive it. There must be actual payment; the giving of a cheque is

not conditional payment of a secured debt so as to release the security³, and payment of substantial sums by registered post which were stolen in transit cannot be relied on⁴. The mortgagor cannot unilaterally appropriate a cross-claim for unliquidated damages in discharge of the debt⁵ even if it gives rise to an equitable set-off⁶.

An agent's authority to receive the debt may be express or implied⁷. The authority of a mortgagee's solicitor to receive money secured by the mortgagee is considered elsewhere in this work⁸.

Where the advance is expressed to be made by several persons out of money belonging to them on a joint account, or the mortgage is made to more than one person jointly, the written receipt of the survivors or the last survivor of them, or of the personal representatives of the last survivor, is a complete discharge for the mortgage money, notwithstanding any notice to the payer of a severance of the joint account⁹.

Where a charge¹⁰ is registered¹¹ in the name of two or more proprietors, a valid receipt for the money secured by the charge may be given by the registered proprietors, the survivors or survivor of the registered proprietors, or the personal representative of the last survivor of the registered proprietors¹².

1 See PARA 304 et seq.

2 Where the mortgage is not by deed, the claim for the debt may be barred by lapse of time, but the creditor may nevertheless be entitled to enforce the charge: see **LIMITATION PERIODS** vol 68 (2008) PARA 1105.

3 *Re J Defries & Sons Ltd, Eichholz v J Defries & Sons Ltd* [1909] 2 Ch 423. See also *Henderson v Arthur* [1907] 1 KB 10 at 13-14, CA, per Farwell LJ.

4 *Mitchell-Henry v Norwich Union Life Insurance Society* [1918] 2 KB 67, CA.

5 *Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1970] 3 All ER 950, [1971] 1 WLR 43, CA; *Mobil Oil v Rawlinson* (1981) 43 P & CR 221, 126 Sol Jo 15.

6 *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA. A claim to a quantified sum by way of equitable set-off might discharge the mortgage debt: see *National Westminster Bank plc v Skelton*. See also *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA.

7 As to an agent's implied authority see generally **AGENCY** vol 1 (2008) PARA 37 et seq.

8 See *Wilkinson v Candlish* (1850) 5 Exch 91; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 791. As to receipts in deeds produced by solicitors see PARAS 368 note 2, 641. The receipt of the mortgagee's solicitor in a claim to recover the debt is a good discharge: *Bourton v Williams* (1870) 5 Ch App 655.

9 See the Law of Property Act 1925 s 111(1); and PARA 212.

10 As to the meaning of 'charge' see PARA 155 note 5.

11 As to the meaning of 'registered' see PARA 155 note 3.

12 See the Land Registration Act 2002 s 56(a)-(c); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 953.

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640. Discharge by accord and satisfaction.

The debt may be discharged by accord and satisfaction¹ where, for example, the creditor accepts some consideration in full discharge, not being payment after the debt has become

due of a smaller sum than the debt², or where the mortgagee agrees to discharge the security as part of a voluntary arrangement³.

A release of a debt is binding without consideration if made under seal, but otherwise must be made for consideration⁴.

1 As to accord and satisfaction see **CONTRACT** vol 9(1) (Reissue) PARAS 1043-1052. If the mortgagee accepts worthless debentures in a company formed by the mortgagor in substitution for his mortgage, he cannot subsequently rely on the mortgage: *Re Goldberg, ex p Silverstone* [1912] 1 KB 384.

2 *Foakes v Beer* (1884) 9 App Cas 605, HL, following *Pinnel's Case* (1602) 5 Co Rep 117a. See also **CONTRACT** vol 9(1) (Reissue) PARAS 1045, 1052.

3 See PARAS 518, 523.

4 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 31, 59.

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641. Evidence of receipt.

A mortgagor is entitled to a receipt at the time he makes repayment¹. Where a solicitor produces a mortgage deed indorsed with a receipt signed by the mortgagee or a deed signed by the mortgagee containing a receipt, the deed is sufficient authority for payment to the solicitor². If it is proposed to pay the sums required to a solicitor on his undertaking to procure the discharge of the mortgage, the cheque or draft should be made payable to the mortgagee rather than to the solicitor unless the mortgagee provides authority to the solicitor to receive payment³.

1 See *Rourke v Robinson* [1911] 1 Ch 480; and PARA 643.

2 See the Law of Property Act 1925 s 69.

3 *Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)* [1984] AC 296, [1984] 2 WLR 1, PC. The assertion of the solicitor that he has authority is not sufficient.

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(2) EFFECT OF PAYMENT, RECEIPTS AND TRANSFERS AND DELIVERY OF DEEDS

(i) Effect of Payment

642. In general.

When money secured by the mortgage has been discharged, a mortgage, other than a registered charge¹, becomes a satisfied term and ceases unless the money was paid by a

person having a limited interest in the equity of redemption who requires the mortgage to be kept alive by transfer or otherwise². Hence there is no need for a reconveyance of freeholds or reassignment of leaseholds; and, although a surrender of the mortgage term is appropriate where a mortgage is discharged as to part only of the property comprised in it³, where it is completely discharged a surrender has no operation, as the mortgage term ceases upon discharge. All that is required, therefore, to discharge a legal charge or mortgage created by demise, is evidence that the principal money, with interest and costs, has been paid⁴. Evidence of payment is sufficient to discharge an equitable mortgage in whatever form it was created⁵.

In general, where a mortgage has been paid off, the mortgagee is a trustee for the mortgagor, so that if necessary a vesting order can be made under the appropriate statutory provision or a person may be appointed to convey⁶.

1 As to discharge of registered charges see PARA 647.

2 See the Law of Property Act 1925 s 116. In the case of a legal mortgage of land by demise, the term of years merges in the reversion where the purpose for which it was created is satisfied: see s 5; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 113.

3 A trustee-mortgagee may release part of his security on receipt of the whole of the purchase money produced thereby: *Re Morrell and Chapman's Contract* [1915] 1 Ch 162.

4 See *Edwards v Marshall-Lee* (1975) 119 Sol Jo 506, 235 Estates Gazette 901, CA. As to legal mortgages see PARA 104.

5 As to equitable mortgages see PARA 105.

6 In the case of a trustee, an order can be made under the Trustee Act 1925 ss 41, 51, 54: see *Holme v Fieldsend* [1911] WN 111, 55 Sol Jo 552 (one of two joint mortgagees wilfully refusing or neglecting to convey). See also **TRUSTS** vol 48 (2007 Reissue) PARAS 632, 641 et seq. In the case of a minor an order can be made in the like manner as in the case of a trustee under a disability: see the Trustee Act 1925 s 46; and **TRUSTS** vol 48 (2007 Reissue) PARA 881. As to the position in the case of a mortgagee who lacks mental capacity see the Mental Capacity Act 2005 Pt 2 (ss 45-61); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 750 et seq.

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643. Rights of person making payment.

On payment of all money secured by the mortgage, the mortgagor is entitled to have the property restored to him free from the mortgagee's security. For that purpose, the mortgagee must execute any discharge or reconveyance that may be appropriate, although no express reconveyance is now normally required in the case of a mortgage of land¹, and he must deliver up the title deeds² to the mortgagor, if he is the person making the payment³. If the payment is made by some person interested in the equity of redemption other than the mortgagor and it is desired to keep the mortgage alive, a transfer of the mortgage should be taken⁴.

Thus a second mortgagee who redeems is entitled to a transfer⁵; and so is the mortgagor himself, after he has assigned the equity of redemption, if he is sued on his covenant for payment and pays the debt⁶, but in this case the transfer is made subject to such equity of redemption as may be vested in any person other than himself⁷. The person claiming to redeem must at his own expense prove a prima facie title to do so⁸. Where there has been a sub-mortgage, both the mortgagee and the sub-mortgagee must give a discharge or reconvey⁹. If the accounts between the mortgagee and sub-mortgagee have not been settled, the

mortgagor can require a reconveyance from them on payment into court of the amount due from him¹⁰.

If a purchaser from the mortgagor redeems, he is entitled to have transferred to him any securities held by the mortgagee for the debt, including a personal judgment which the mortgagee has obtained against the mortgagor¹¹.

1 As to the principle that a mortgage term ceases on payment of all money secured see PARA 642. As to the effect of a receipt given by the mortgagee see PARAS 644-646. As to reassignment in the case of a mortgage of personalty see PARA 646.

2 As to the delivery of title deeds see further PARAS 651-653.

3 *Tasker v Small* (1837) 3 My & Cr 63 at 70; *Thornton v Court* (1854) 3 De GM & G 293; *Palmer v Hendrie* (1859) 27 Beav 349; *Palmer v Hendrie (No 2)* (1860) 28 Beav 341; *Walker v Jones* (1866) LR 1 PC 50 at 61; *Rourke v Robinson* [1911] 1 Ch 480; *Webb v Crosse* [1912] 1 Ch 323. As to terms of redemption see PARA 324. As to tender see further PARAS 332-333. As to the mortgagor's right to call for a transfer to a third person instead of a conveyance to himself see PARA 364.

4 A statutory receipt may operate as a transfer: see PARA 645. See also *Pearce v Morris* (1869) 5 Ch App 227; and PARA 313.

5 *Smith v Green* (1844) 1 Coll 555 at 563.

6 *Kinnaird v Trollope* (1888) 39 ChD 636.

7 *Kinnaird v Trollope* (1888) 39 ChD 636 at 645.

8 *James v Biou* (1819) 3 Swan 234 at 237. See also PARA 316.

9 *Lysaght v Westmacott* (1864) 33 Beav 417. As to sub-mortgages see PARAS 250-257.

10 *Lysaght v Westmacott* (1864) 33 Beav 417.

11 *Greenough v Littler* (1880) 15 ChD 93.

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(ii) Forms of Receipt and Discharge

644. Ordinary receipt.

A receipt given by the mortgagee or his successor in title for all principal, interest and costs is sufficient evidence that all money secured by the mortgage has been paid and that the mortgagee or his successor in title has no further interest in or claim against the mortgaged property. This is so whether the mortgage is a legal mortgage, by demise or legal charge, or an equitable mortgage¹. Usually, however, the receipt is given in the form which is known as a statutory receipt².

1 See *Edwards v Marshall-Lee* (1975) 119 Sol Jo 506, 235 Estates Gazette 901, CA.

2 See the Law of Property Act 1925 s 115; and PARA 645.

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645. Statutory receipt.

A statutory receipt must be indorsed on, written¹ at the foot of, or annexed to the mortgage², and must be for all the money thereby secured³. Where the mortgage consists of a mortgage and further charge, or of more than one deed, it is sufficient if the receipt refers either to all the deeds or to the aggregate amount of the mortgage money⁴ secured by them and for the time being owing, and is indorsed on, written at the foot of, or annexed to, one of the mortgage deeds⁵. The receipt must state the name of the person who pays the money⁶, and must be executed⁷ by the chargee by way of legal mortgage⁸ or by the person in whom the mortgaged property⁹ is vested and who is legally entitled to give a receipt for the mortgage money¹⁰.

A receipt so given operates, without any reconveyance, surrender or release:

- 96 (1) where a mortgage takes effect by demise or sub-demise, as a surrender of the term, so as to determine the term or merge the same in the reversion immediately expectant on it¹¹;
- 97 (2) where the mortgage does not take effect by demise or sub-demise, as a reconveyance thereof, to the extent of the interest which is the subject matter of the mortgage, to the person who immediately before the execution of the receipt was entitled to the equity of redemption¹²; and
- 98 (3) in either case, as a discharge of the mortgaged property from all principal money and interest secured by, and from all claims under, the mortgage, but without prejudice to any term or other interest which is paramount to the estate or interest of the mortgagee or other person in whom the mortgaged property was vested¹³.

In a statutory receipt the same covenants will be implied as if the person who executes the receipt had by deed been expressed to convey the property as mortgagee¹⁴, subject to any interest which is paramount to the mortgage¹⁵.

1 As to the meaning of 'written' see PARA 454 note 3.

2 As to the meaning of 'mortgage' see PARA 101 note 4.

3 See the Law of Property Act 1925 s 115(1). Where part only of the money is repaid, an ordinary receipt or surrender is appropriate: see PARA 644.

4 As to the meaning of 'mortgage money' see PARA 104 note 1.

5 Law of Property Act 1925 s 115(7).

6 If it does not state the payer's name it takes effect as an ordinary receipt: see *Edwards v Marshall-Lee* (1975) 119 Sol Jo 506, 235 Estates Gazette 901, CA.

7 It need be made only under hand: *Simpson v Geoghegan* [1934] WN 232.

8 As to the meaning of 'legal mortgage' see PARA 104 note 1.

9 I.e. the property remaining subject to the mortgage at the date of the receipt: Law of Property Act 1925 s 115(11). As to the meaning of 'property' see PARA 101 note 5. The reference in s 115(1) to a 'chargee by way of legal mortgage' shows that this provision applies to legal charges; and this is expressly provided for: see s 115(8).

10 Law of Property Act 1925 s 115(1). For the form of statutory receipt see s 115(5), Sch 3 Form 2 (s 115(5) amended by the Finance Act 1971 s 69(7), Sch 14 Part VI). A receipt in the statutory form may be given with such variations and additions, if any, as may be deemed expedient: Law of Property Act 1925 s 115(5). As to the addition to the form where the money is paid by personal representatives or trustees see PARA 649.

11 Law of Property Act 1925 s 115(1)(a). As a receipt for all money secured, whether given in statutory form or not, has the effect of terminating the legal demise, legal charge or equitable mortgage or charge (see PARA 642), this provision as to the operation of a statutory receipt appears to have no effect, and it seems that it was inserted merely to show that, as a matter of conveyancing, the property is cleared of the incumbrance.

12 Law of Property Act 1925 s 115(1)(b).

13 Law of Property Act 1925 s 115(1).

14 As to the meaning of 'mortgagee' see PARA 104 note 1.

15 Law of Property Act 1925 s 115(6). As to the covenant so implied see PARA 223.

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646. When statutory receipt available.

A statutory receipt can generally be used for mortgages¹, except bills of sale², and registered charges³. Personal property is, however, usually mortgaged by assignment, and on payment off is reassigned by deed or instrument under hand. Where stock has been mortgaged by joint mortgagors, the reassignment must be to or at the direction of all; otherwise the mortgagee will be liable for any loss thereby arising⁴. A statutory mortgage⁵ may be surrendered or discharged by the prescribed form of receipt⁶.

The discharge of mortgages over ships, aircraft and hovercraft is dealt with elsewhere in this work⁷.

1 See the Law of Property Act 1925 s 115(8); and PARA 645.

2 See the Law of Property Act 1925 s 114(5). As to entering satisfaction of a bill of sale see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1837.

3 See the Law of Property Act 1925 s 115(10) (amended by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (11)). As to the meaning of 'registered charge' see PARA 159 note 7: definition applied by the Law of Property Act 1925 s 115(10). As to the discharge of a registered charge see PARA 647.

4 *Magnus v Queensland National Bank* (1887) 36 ChD 25; affd (1888) 37 ChD 466, CA. As to mortgages of stocks and shares see PARA 237. As to the redemption of a loan made in foreign currency see *British Bank for Foreign Trade Ltd v Russian Commercial and Industrial Bank* (1921) 38 TLR 65; *Feist v Société Intercommunale Belge d'Électricité* [1934] AC 161, HL. As to foreign money obligations see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1299 et seq.

5 See PARA 192.

6 See the Law of Property Act 1925 s 120, Sch 4 Form 5.

7 See **AIR LAW** vol 2 (2008) PARAS 431, 432; **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 335-336.

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647. Charges on registered land.

The legal estate created by a charge over registered land is deemed to be vested in the registered proprietor as a result of the registration, and therefore continues to subsist until discharged, notwithstanding payment¹. A registered charge may be discharged either by documentary proof of satisfaction of the charge², or in electronic form³. Documentary discharge must be in the prescribed form⁴, executed as a deed or authenticated in such other manner as the registrar may approve⁵, although the registrar is entitled to accept and act upon any other proof of satisfaction of a charge he may regard as sufficient⁶. An application to register a discharge must be made in the prescribed form⁷.

Electronic notification of the discharge of or the release of part of a registered estate in a registered title may be given by the mortgagee with the same effect as a prescribed form of discharge⁸. The discharge of a registered charge does not affect accrued rights under the contractual obligations contained in the charge⁹.

1 See the Land Registration Act 2002 s 58; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 859.

2 See the Land Registration Rules 2003, SI 2003/1417, r 114; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959.

3 See the Land Registration Rules 2003, SI 2003/1417, r 115; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959.

4 See the Land Registration Rules 2003, SI 2003/1417, r 114(1), (2); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959.

5 Land Registration Rules 2003, SI 2003/1417, r 114(3); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959.

6 Land Registration Rules 2003, SI 2003/1417, r 114(4); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959.

7 See the Land Registration Rules 2003, SI 2003/1417, r 114(5); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959.

8 See the Land Registration Rules 2003, SI 2003/1417, r 115; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959.

9 See *Bristol & West plc v Bartlett* [2002] EWCA Civ 1181, [2002] 4 All ER 544, [2003] 1 WLR 284.

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(iii) Discharge as Transfer

648. Discharge of building society mortgages.

The provisions relating to statutory receipts¹ apply (in substitution for the like provisions relating to receipts given by or on behalf of a building society²) to the discharge of a mortgage made to any building society, provided that the receipt is executed in the manner required by the statute relating to the society³. However, when all the money intended to be secured by the mortgage given to the building society has been fully paid or discharged, the society may endorse on or annex to the mortgage one or other of:

- 99 (1) a receipt in the prescribed form signed by any person acting under the authority of the board of directors⁴;
- 100 (2) a reconveyance of the mortgaged property to the mortgagor⁵;
- 101 (3) a reconveyance of the mortgaged property to such person of full age, and on such trusts (if any), as the mortgagor may direct⁶,

and the provisions relating to statutory receipts⁷ do not apply to a receipt in the prescribed form so indorsed or annexed⁸.

1 The provisions of the Law of Property Act 1925 s 115: see PARA 645.

2 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2020-2021.

3 Law of Property Act 1925 s 115(9) (amended by the Industrial and Provident Societies Act 1965 s 77(1), Sch 5; the Friendly Societies Act 1971 s 14(2), Sch 3; and the Finance Act 1971 s 64, Sch 14 Pt VI). As to the manner required by the statute relating to the society see note 8.

4 Building Societies Act 1986 Sch 2A para 1(1)(a) (Sch 2A added by the Building Societies Act 1997 s 7(2), Sch 2). See further **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2021.

5 Building Societies Act 1986 Sch 2A para 1(1)(b) (as added: see note 4).

6 Building Societies Act 1986 Sch 2A para 1(1)(c) (as added: see note 4).

7 See note 1.

8 See the Building Societies Act 1986 Sch 2A para 1(3) (as added: see note 4); and see further **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2021. Where a receipt is so indorsed or annexed to a mortgage, and is not a registered charge within the meaning of the Land Registration Act 2002 (see PARA 159 note 7), the receipt operates in accordance with the Law of Property Act 1925 s 115(1), (3), (6), (8) (see PARA 645), in the like manner as a receipt that fulfils the requirements of s 115(1): see the Building Societies Act 1986 Sch 2A para 1(2) (as so added; and amended by the Land Registration Act 2002 s 133, Sch 11 para 19(1), (2)).

In the application of the Law of Property Act 1925 s 115(9) (see the text to notes 1-3) to a receipt so indorsed or annexed but not in the prescribed form, the receipt is taken to be executed in the manner required by the statute relating to the society (see the text to note 3) if it is signed by any person acting under the authority of the board of directors: see the Building Societies Act 1986 Sch 2A para 1(3) (as so added). As to the position regarding registered charges see PARA 647.

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649. Transfer by statutory receipt.

Where a statutory receipt may be used¹ and by the receipt the money appears to have been paid by a person who is not entitled to the immediate equity of redemption, the receipt operates, save in the case of registered land, as if the benefit of the mortgage² had by deed been transferred to him³, unless either it is otherwise expressly provided⁴ or the mortgage is paid off out of capital money or other money in the hands of a personal representative or trustee properly applicable for the discharge of the mortgage, and it is not expressly provided that the receipt is to operate as a transfer⁵.

It is essential to a receipt operating as a transfer that it should appear by the receipt that the person making the payment is not entitled to the immediate equity of redemption. A statement in the receipt that he is not so entitled will suffice, but is not strictly necessary as that fact may

be indicated by the receipt⁶. If the persons paying the money are the personal representatives of the deceased mortgagor, the equity of redemption will normally be vested in them, so that no special statement as to the source of payment is required; but if the money is paid out of capital money by trustees of a settlement, the equity of redemption being vested in the tenant for life, there should be a statement that the payment is made out of a fund applicable to the discharge of the mortgage⁷.

The operation of a statutory receipt as a transfer does not affect the right of any person to require a reassignment, surrender, release or transfer to be executed in lieu of a receipt⁸; and where there is no right to keep the mortgage alive the receipt does not operate as a transfer⁹. The mortgagor¹⁰ himself cannot keep the mortgage alive as against subsequent incumbrancers¹¹. Hence, where there are subsequent incumbrancers, the receipt cannot operate as a transfer to the mortgagor. The mortgagee cannot safely transfer his mortgage to the mortgagor or his nominee without the consent of intermediate incumbrancers of whom he has notice¹².

1 See PARA 646.

2 As to the meaning of 'mortgage' see PARA 101 note 4.

3 Law of Property Act 1925 s 115(2). Thus the receipt operates as if there were a transfer under s 114: see PARA 365; and *Simpson v Geoghegan* [1934] WN 232; *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536.

4 Law of Property Act 1925 s 115(2)(a). See *Pyke v Peters* [1943] KB 242 (mortgage of annuity and policies of insurance; sale by mortgagor of part of annuity and of insurance policies and redemption of mortgage out of purchase money by purchasers; sale intended to supersede mortgage; purchasers not transferees of mortgage).

5 Law of Property Act 1925 s 115(2)(b).

6 *Simpson v Geoghegan* [1934] WN 232; *Pyke v Peters* [1943] KB 242.

7 See the Law of Property Act 1925 s 115(5), Sch 3 Form 2 Note. The receipt will then operate as a discharge. If it is desired to keep the mortgage alive, the words 'and this receipt shall operate as a transfer', should be added.

8 Law of Property Act 1925 s 115(4). The statutory form of transfer (see s 114(3), Sch 3 Form 1) is quite short and avoids the difficulties which may arise in respect of a transfer by indorsed receipt.

9 Law of Property Act 1925 s 115(3). See also *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536.

10 As to the meaning of 'mortgagor' see PARA 104 note 1.

11 See the Law of Property Act 1925 s 115(3). See also *Otter v Lord Vaux* (1856) 6 De GM & G 638; and PARA 673. As to the meaning of 'incumbrancer' see PARA 223 note 4.

12 *Re Magneta Time Co Ltd, Molden v Magneta Time Co Ltd* (1915) 84 LJCh 814. See also PARA 364.

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650. Subrogation.

Even if there is no statutory receipt which operates as a transfer so that the mortgage or charge is discharged, it may be treated as having been assigned in equity by the doctrine of subrogation¹.

1 See PARA 384; and **EQUITY** vol 16(2) (Reissue) PARAS 770-776.

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(iv) Delivery of Deeds

651. Delivery of title deeds.

In general, all deeds relating to the title to the mortgaged property, including the mortgage deed and transfers of the mortgage, must be given up¹. Where there has been a former mortgage to the same mortgagee, followed by reconveyance, these deeds form part of the mortgagor's title and must be given up². If the mortgage deed comprises other property, the mortgagor is entitled to a reconveyance of the mortgaged property, but not, it seems, to delivery of the mortgage deed³, although he is entitled to a covenant for production⁴. Where several trust mortgages have been transferred to trustees by one deed, the mortgagor first redeeming is entitled to have the transfer deed delivered to him on giving the trustees a covenant or acknowledgment for production⁵. Where the mortgagee has lost all title to the mortgaged land through lapse of time⁶, the mortgagor is entitled to recover possession of the title deeds⁷.

1 *Re Wade and Thomas* (1881) 17 ChD 348. The documents which had to be given up included, formerly, a settlement of the mortgage money which had been allowed to get on the title (see *Dobson v Land* (1851) 4 De G & Sm 575 at 581); but on a transfer to trustees the trust should not be disclosed (see PARA 373); and even if a trust of the mortgage money should be disclosed, the mortgagor is not concerned with it (see the Law of Property Act 1925 s 113(1); and PARA 373). As to the mortgagor's right to delivery of title deeds upon payment of all money secured see PARA 643. As to the custody of deeds during the continuance of the security see PARA 485 et seq.

2 *Hudson v Malcolm* (1862) 10 WR 720.

3 See *Young v Whitchurch and Ellesmere Banking Co* (1867) 37 LJCh 186 (where, however, the report is not clear as to the retention of the original conveyance).

4 *Yates v Plumbe* (1854) 2 Sm & G 174.

5 *Capper v Terrington* (1844) 13 LJCh 239. Before tacking became restricted (see PARAS 264-265), the mortgagee could not retain the deeds until payment of a sum not covered by the mortgage (*Chilton v Carrington* (1854) 15 CB 95), where at the time of payment no right to tack the further sum had arisen (*Brecon Corpn v Seymour* (1859) 5 Jur NS 1069).

6 See the Limitation Act 1980 ss 15, 17, 20; and PARA 515. See also **LIMITATION PERIODS** vol 68 (2008) PARAS 1025, 1095, 1124.

7 *Lewis v Plunket* [1937] Ch 306, [1937] 1 All ER 530. See also **LIMITATION PERIODS** vol 68 (2008) PARA 992.

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652. Effect of tender.

Tender of the mortgage money¹, even though improperly refused, does not entitle the mortgagor to delivery of the deeds². However, an order may be obtained giving him liberty to pay into court a stated sum sufficient to cover principal, interest, and the probable costs of proceedings; and upon that payment the mortgagee will be ordered to deliver up the deeds³.

1 As to tender see PARAS 332-333.

2 *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 283, PC; and see *Johnson v Diprose* [1893] 1 QB 512, CA. See also PARA 485 et seq.

3 *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273, PC.

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653. Effect of subsequent incumbrances.

If the mortgagee has notice of subsequent incumbrances, he is not bound to redeliver the deeds to the mortgagor without being satisfied that the subsequent incumbrancers have been paid off¹. However, unless he has notice of the right or claim of a person having a better right, he is not liable for delivering the deeds to a person not having the best right to them²; and although the registration of another incumbrance under the Land Charges Act 1972 is actual notice of the incumbrance³, this is not so in the case of a mortgagee who delivers the title deeds on his mortgage being surrendered or otherwise extinguished⁴.

1 *Corbett v National Provident Institution* (1900) 17 TLR 5.

2 Law of Property Act 1925 s 96(2). See also PARA 497.

3 See PARA 261.

4 See the Law of Property Act 1925 s 96(2) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule). As to delivery of title deeds see PARA 497.

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(v) Costs of Reconveyance and Delivery of Deeds

654. By whom costs borne.

The costs of reconveyance are borne by the mortgagor¹. They include not only the ordinary costs where the mortgage title has not been changed by assignment² or devolution, but also any extraordinary costs rendered necessary by a change of title or other event, such as the cost of obtaining a vesting order where the person who should reconvey cannot be found or is under disability³, or where the legal estate is in a trustee-mortgagee who has absconded⁴. They do not, however, include the costs of any order required where the mortgagee himself has become mentally disordered, these being normally paid out of his estate⁵, nor costs occasioned by the mortgagee mixing the title to the mortgaged estate with other property⁶.

- 1 *King v Smith* (1848) 6 Hare 473 at 475.
- 2 See *Wetherell v Collins* (1818) 3 Madd 255.
- 3 *Ex p Ommaney* (1841) 10 Sim 298; *King v Smith* (1848) 6 Hare 473; and see *Re Stuart, ex p Marshall* (1859) 4 De G & J 317.
- 4 *Webb v Crosse* [1912] 1 Ch 323.
- 5 See eg *Re Lewis, ex p Richards* (1820) 1 Jac & W 264; *Re Townsend* (1847) 2 Ph 348; but contrast *Re Marrow* (1841) Cr & Ph 142.
- 6 *King v Smith* (1848) 6 Hare 473 at 475; and see *Capper v Terrington* (1844) 1 Coll 103.

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655. Costs of getting deeds out of court.

Where the deeds have come into the court's custody in the course of the reasonable and proper administration of the mortgagee's estate, the costs of getting them out must be paid by the mortgagor¹, but not if the advance was made by the executors and the mortgagor had no notice of their character or of the proceedings².

- 1 *Burden v Oldaker* (1844) 1 Coll 105.
- 2 *Reed v Freer* (1844) 13 LJCh 417.

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(3) PROCEEDINGS FOR REDEMPTION

(i) Parties

656. Necessary parties.

All persons entitled to redeem¹, and all persons entitled to any part of the security or debt, are necessary parties to redemption proceedings², but the court will not stop redemption on account of the absence of a party who cannot be found if the mortgagee runs no risk³, and it can protect the rights of the absent party by preserving them in the judgment⁴. The rule requiring the presence of all parties is based on the mortgagee's right to account once for all, which can only be done if the account is taken in the presence of all parties who could demand an account. A person entitled to redeem cannot be omitted because his interest is small⁵. The mortgagee after assignment and intermediate assignees are not necessary parties unless they have been in possession and the mortgagor, alleging receipts in excess of the debt, claims personal repayment⁶.

1 See PARA 304.

2 *Fell v Brown* (1787) 2 Bro CC 276; *Farmer v Curtis* (1829) 2 Sim 466; *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 134; *Audsley v Horn* (1858) 26 Beav 195; *Hood v Easton* (1856) 2 Jur NS 729, where a stranger had, by the mortgagee's authority, obtained possession of part of the mortgaged property.

3 *Faulkner v Daniel* (1843) 3 Hare 199 at 212.

4 *Francis v Harrison* (1889) 43 ChD 183; *Griffith v Pound* (1890) 45 ChD 553; *Hall v Heward* (1886) 32 ChD 430, CA.

5 *Hunter v Mackleu* (1846) 5 Hare 238.

6 *Chambers v Goldwin* (1804) 9 Ves 254 at 269; *Hall v Heward* (1886) 32 ChD 430, CA.

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657. Sub-mortgagee.

Where a mortgage has been sub-mortgaged, both the original mortgagee and the sub-mortgagee are necessary parties in a claim for redemption by the original mortgagor¹, but the original mortgagee may redeem the sub-mortgagee without making the original mortgagor a party².

1 *Chambers v Goldwin* (1804) 9 Ves 254 at 269; *Re Burrell, Burrell v Smith* (1869) LR 7 Eq 399; *Hobart v Abbot* (1731) 2 P Wms 643.

2 As to sub-mortgages see PARAS 250-257.

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658. Personal representatives and trustees.

On the death of a mortgagee of freehold or leasehold land, his personal representatives are necessary parties to proceedings for redemption¹. Where the equity of redemption is settled, the tenant for life in whom the legal estate is vested will be the proper party to represent the settled land; in other cases of land held on trust, the beneficiaries are sufficiently represented by trustees, executors or administrators, but the court may direct beneficiaries to be added at any stage of the proceedings². Beneficiaries are not bound if under the circumstances the trustees do not represent their interests³.

Notwithstanding anything to the contrary in the trust instrument, the trustees' written receipt is a sufficient discharge for the money when the mortgage debt has been paid⁴.

1 See the Administration of Estates Act 1925 s 1(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 363.

2 *Jennings v Jordan* (1881) 6 App Cas 698, HL; *Re Cooper, Cooper v Vesey* (1882) 20 ChD 611, CA. See also CPR 19.1, 19.3, 19.7A; *Practice Direction--Addition and Substitution of Parties* PD 19; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 210, 211, 225.

3 *Re De Leeuw, Jakens v Central Advance and Discount Corpn* [1922] 2 Ch 540. As to the creditors' rights under deeds of assignment to trustees for payment of debts see *Slade v Rigg* (1843) 3 Hare 35; *Smith v Baker* (1842) 1 Y & C Ch Cas 223 at 229; *Morley v Morley* (1858) 25 Beav 253; *Troughton v Binkes* (1801) 6 Ves 573; *Yeatman v Yeatman* (1877) 7 ChD 210.

4 See the Trustee Act 1925 s 14(1), (3); and **TRUSTS** vol 48 (2007 Reissue) PARA 1051.

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659. Claim by later incumbrancer.

In the case of successive mortgages, a later mortgagee must make all mortgagees subsequent to himself, as well as the mortgagor, parties in proceedings to redeem a prior mortgage¹. If he seeks to redeem any other mortgage than the one immediately prior to himself he must make parties all mortgagees between himself and the mortgage he seeks to redeem², but he need not make a mortgagee prior to that mortgage a party unless the amount due cannot be ascertained in his absence. As between himself and all behind him, a later mortgagee has a prior right to redeem a prior mortgage³.

1 *Fell v Brown* (1787) 2 Bro CC 276; *Johnson v Holdsworth* (1850) 1 Sim NS 106 at 109; *Farmer v Curtis* (1829) 2 Sim 466; *Rose v Page* (1829) 2 Sim 471; *Ramsbottom v Wallis* (1835) 5 LJCh 92; *Richards v Cooper* (1842) 5 Beav 304; *Slade v Rigg* (1843) 3 Hare 35; *Teevan v Smith* (1882) 20 ChD 724, CA.

2 *Teevan v Smith* (1882) 20 ChD 724, CA.

3 *Lord Kensington v Bouverie* (1852) 16 Beav 194. As to where the subsequent mortgagee cannot make the mortgagor a party, eg by reason of a covenant not to foreclose for a certain period see *Ramsbottom v Wallis* (1835) 5 LJCh 92; *Rhodes v Buckland* (1852) 16 Beav 212.

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660. Mortgage on two properties.

Where two properties are subject to the same mortgage, the owner of the equity of redemption of the one property is a necessary party in a claim to redeem the other property¹.

1 *Palk v Lord Clinton* (1805) 12 Ves 48 at 59; *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 134; *Hall v Heward* (1886) 32 ChD 430, CA. As to consolidation see PARA 498 et seq.

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(ii) Institution of Proceedings

661. Jurisdiction and procedure.

The jurisdiction of the High Court and county court, and procedural matters generally are dealt with elsewhere in this title¹.

¹ See PARA 530 et seq.

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(iii) Statements of Case and Disclosure

662. Particulars or evidence in support of claim.

The claimant must set forth in his particulars of claim, or in a witness statement in support of the claim, the mortgage contract and all the material facts, showing, if he is not the original mortgagor, how he derives his right to redeem; and he should also state briefly any special circumstances, such as that the defendant mortgagee has been in possession¹. The mortgagee may deny the claimant's right to redeem², or any of the allegations in the particulars of claim or in a witness statement.

¹ As to procedure generally see PARAS 532-534.

² This denial, if unfounded, may be a ground for depriving the mortgagee of his costs: *Incorporated Society in Dublin v Richards* (1841) 1 Dr & War 258 at 334.

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663. When offer to redeem unnecessary.

Every claim against a mortgagee by the owner of the equity of redemption who admits the mortgage must expressly or by implication contain an offer to redeem¹, except where a person entitled to redeem asks for a sale of the mortgaged property instead of redemption², or where the question raised is one merely of construction arising under the mortgage deed³, or where the mortgagee has become a party to trusts affecting the equity of redemption, in which case any person interested in those trusts may enforce their due performance without offering to redeem⁴, or, possibly, where the mortgagee proposes to make an improper sale⁵.

¹ *Troughton v Binkes* (1801) 6 Ves 573; *Dalton v Hayter* (1844) 7 Beav 313; *Tasker v Small* (1837) 3 My & Cr 63; *Inman v Wearing* (1850) 3 De G & Sm 729; *Harding v Tingey* (1864) 34 LJCh 13; *Hughes v Cook* (1865) 34 Beav 407; *Gordon v Horsfall* (1847) 5 Moo PCC 393. It seems, however, that there is no rule that an annuitant whose annuity is repurchasable may only be sued for purposes of redemption: *Knight v Bowyer* (1858) 2 De G & J 421 at 446.

² See the Law of Property Act 1925 s 91; and PARA 671. Under the old practice an offer to redeem had to be pleaded expressly or in substance, but if the statements of case made a case for redemption the court would

give permission to amend (*Palk v Lord Clinton* (1805) 12 Ves 48), and would require the mortgagor to undertake to redeem (*Balfe v Lord* (1842) 2 Dr & War 480).

3 *Re Nobbs, Nobbs v Law Reversionary Interest Society* [1896] 2 Ch 830.

4 *Dalton v Hayter* (1844) 7 Beav 313; *Jefferys v Dickson* (1866) 1 Ch App 183.

5 *Murad v National Provincial Bank Ltd* (1966) 198 Estates Gazette 117.

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664. Redemption in proceedings brought to impeach mortgage.

Under the old Chancery practice, a mortgagor who did not admit the mortgage, and failed in an action, containing no claim for redemption, brought to impeach the mortgage, would not be allowed in that action to redeem a mortgagee who had relied wholly on his title as mortgagee, but had to commence a new action for redemption¹. He could, however, redeem in the same action if the mortgagee did not rely solely on his title as mortgagee, but claimed that he had become absolute owner².

1 *Martinez v Cooper* (1826) 2 Russ 198 at 215; *Johnson v Fesenmeyer* (1858) 25 Beav 88; *Crenver etc Mining Co Ltd v Willyans* (1866) 35 Beav 353; cf *Jervis v Berridge* (1873) 8 Ch App 351 at 358 per Lord Selborne LC. The authorities referred to in this paragraph must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq. As to procedure generally see PARAS 532-534.

2 *National Bank of Australasia v United Hand-in-Hand and Band of Hope Co* (1879) 4 App Cas 391, PC. See note 1.

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665. Disclosure in redemption claim.

In a claim for redemption, disclosure can be enforced of the amount claimed to be due¹, of the mortgagee's securities² and of the incumbrancers' names³. Such disclosure should now be given or obtained by order before proceedings are commenced⁴. So long as his right to redeem subsists, a mortgagor is entitled at his own cost to inspect and make copies or abstracts of or extracts from the documents of title in the mortgagee's custody or power relating to the mortgaged property⁵.

1 *Bridgwater v De Winton* (1863) 33 LJCh 238; *Elmer v Creasy* (1873) 9 Ch App 69; *Beavan v Cook* (1869) 17 WR 872. As to disclosure generally see CPR Pt 31; and **CIVIL PROCEDURE** vol 11 (2009) PARA 866 et seq.

2 *West of England and South Wales Bank v Nickolls* (1877) 6 ChD 613.

3 *Union of Bank of London v Manby* (1879) 13 ChD 239, CA.

4 See CPR Pt 31; and **CIVIL PROCEDURE** vol 11 (2009) PARA 866 et seq.

⁵ See the Law of Property Act 1925 s 96(1); and PARA 491. It seems that inspection can be enforced by a mortgagor by proceedings in the Chancery Division: see *Burn v London and South Wales Coal Co and Risca Investment Co* (1890) 7 TLR 118.

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(iv) Order for Redemption or Sale

666. Order for redemption.

The common form order for redemption directs an account of what is due to the mortgagee under and by virtue of the mortgage, and for his assessed costs of the redemption claim, and directs that, on the mortgagor paying to the mortgagee the amount certified to be due within six months¹ after the date of the master's order², at a time and place to be appointed by that order, the mortgagee is to surrender or give a statutory receipt³ and deliver up the title deeds; and it further directs that if the mortgagor makes default in that payment his claim is to stand dismissed with costs. If one of two mortgagees has disappeared, the costs of obtaining a vesting order to get his interest must be borne, in the absence of misconduct by the other mortgagee, by the mortgagor⁴. If the mortgagee has been in possession, the order directs as against the mortgagee an account of the rents and profits of the mortgaged property on the footing of wilful default⁵; and if the mortgagor alleges that nothing is due on the mortgage, a direction is added for surrender within 21 days after the date of the certificate, if on taking the accounts it appears that nothing is in fact due⁶.

¹ This means calendar months: see the Law of Property Act 1925 s 61(a); CPR 2.10; and **CIVIL PROCEDURE** vol 11 (2009) PARA 90. A longer or shorter time may be given in special circumstances: *Lewis v Aberdare and Plymouth Co* (1884) 53 LJCh 741.

² As to the master's order see PARA 596.

³ ie pursuant to the Law of Property Act 1925 s 115: see PARA 645.

⁴ *Webb v Crosse* [1912] 1 Ch 323.

⁵ As to wilful default see PARA 428 et seq.

⁶ *Reed v Cooper* (1884) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1853-1854.

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667. Special directions.

Special directions are sometimes added as to improvements or substantial repairs by the mortgagee, but sums expended in necessary repairs, and any sums properly included under the mortgage contract, may be allowed without special directions¹. Special directions may also be added to charge the mortgagee with wilful neglect in allowing the mortgaged property to deteriorate, or for improper management², waste³, or improper sale, or to bring out any special

circumstances, such as a valuation of the security in the mortgagor's bankruptcy⁴, and accounts may be directed to be taken with rests. If the order for redemption is made after tender, the account is directed of what was due on the date of the tender, with consequential directions to meet the alternative results of the amount due exceeding or not exceeding the amount tendered⁵.

1 *Blackford v Davis* (1869) 4 Ch App 304; *Wilkes v Saunton* (1877) 7 ChD 188; *Tipton Green Colliery Co v Tipton Moat Colliery Co* (1877) 7 ChD 192; *Shepard v Jones* (1882) 21 ChD 469, CA. See also PARA 745.

2 *Wragg v Denham* (1836) 2 Y & C Ex 117; *Batchelor v Middleton* (1848) 6 Hare 75 at 85.

3 See PARAS 436-439.

4 *Knowles v Dibbs* (1889) 37 WR 378 (for the form of order in this case see 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1892); *Sanguinetti v Stuckey's Banking Co (No 2)* [1896] 1 Ch 502.

5 See the judgment in *Greenwood v Sutcliffe* [1892] 1 Ch 1, CA (for the form of judgment in this case see 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1854). As to tender see PARAS 332-333.

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668. Successive incumbrancers.

Where there are successive incumbrancers, the order directs redemption by them according to their priorities¹, a later mortgagee on redeeming the prior mortgagees being given the right to foreclose subsequent mortgagees and the mortgagor unless they in their turn redeem him². The order may declare the priorities of the various incumbrancers³, or direct an inquiry as to priorities⁴. If the claim is brought by a later mortgagee to redeem the first mortgagee and he fails to redeem, the claim will be dismissed with costs as against the mortgagor as well as the first mortgagee⁵, but a later mortgagee of two properties, separately mortgaged to different prior incumbrancers, is entitled on redeeming the prior incumbrance on one property to foreclose the mortgagor as regards that property, although the prior incumbrance on the other property remains unredeemed⁶.

1 As to priority between mortgagees see generally PARA 258 et seq.

2 See PARA 600.

3 *Jones v Griffith* (1845) 2 Coll 207.

4 *Duberly v Day* (1851) 14 Beav 9.

5 *Pelly v Wathen* (1849) 7 Hare 351; *Hallett v Furze* (1885) 31 ChD 312.

6 *Pelly v Wathen* (1849) 7 Hare 351. As to foreclosure see PARA 566 et seq.

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669. Effect of failure to redeem.

Failure by a mortgagor to pay the amount certified due to the mortgagee within the time fixed by the order for redemption involves the dismissal of the claim¹, unless the court for good cause extends the time². The court will not readily extend the time in a redemption claim³, but it will do so in a case of genuine mistake⁴.

1 *Faulkner v Bolton* (1835) 7 Sim 319. As to the effect of dismissal see PARA 670.

2 *Jones v Creswicke* (1839) 9 Sim 304.

3 *Novosielski v Wakefield* (1811) 17 Ves 417; *Faulkner v Bolton* (1835) 7 Sim 319.

4 *Collinson v Jeffery* [1896] 1 Ch 644.

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670. Effect of dismissal.

Dismissal for any cause, except want of prosecution¹, of a claim for the redemption of a legal mortgage, is equivalent to a final order of foreclosure against the claimant². In the case of successive mortgages, if the mortgagor is the claimant the effect of excluding his interest is that the last of the incumbrancers becomes quasi-mortgagor, the prior mortgagees ranking according to their priorities³. The dismissal forecloses not only the mortgagor and his successors in title, but also a person who has purchased the equity of redemption after the date of the claim form if the claim has been duly registered as pending⁴, but the trustee in bankruptcy of a mortgagor who becomes bankrupt after the issue of the claim form is not foreclosed unless he has been made a party to the claim⁵.

1 *Hansard v Hardy* (1812) 18 Ves 455. The authorities referred to in this paragraph must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq. As to dismissal for want of prosecution see **CIVIL PROCEDURE** vol 11 (2009) PARA 520.

2 *Cholmley v Countess Dowager of Oxford* (1741) 2 Atk 267; *Bishop of Winchester v Paine* (1805) 11 Ves 194; *Inman v Wearing* (1850) 3 De G & Sm 729; *Re Alison, Johnson v Mounsey* (1879) 11 ChD 284 at 293, CA. It is not, however, so equivalent against other persons entitled to redeem: *Re Gleaves, ex p Paine* (1863) 3 De G & Sm 458 at 463; *Chappell v Rees* (1852) 1 De GM & G 393. As to foreclosure see PARA 566 et seq.

3 *Cottingham v Earl of Shrewsbury* (1843) 3 Hare 627 at 637. As to priority between mortgagees see generally PARA 258 et seq.

4 *Garth v Ward* (1741) 2 Atk 174.

5 *Wood v Surr* (1854) 19 Beav 551. As to foreclosing a surety who has mortgaged his own property see *Beckett v Micklethwaite* (1821) 6 Madd 199; *Aldworth v Robinson* (1840) 2 Beav 287.

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671. Order for sale.

Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in proceedings brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative¹. In proceedings brought by a person interested in the right of redemption and seeking a sale, on the application of any defendant the court may direct the claimant to give security for costs, and may give the conduct of the sale to any defendant, and may give directions as to the costs of any defendant². The court may direct a sale without previously determining the priorities of incumbrancers³.

1 Law of Property Act 1925 s 91(1). As to the general statutory jurisdiction to order sale see s 91(2); and PARA 616. As to the court's discretion to make an order see *Polonski v Lloyd's Bank Mortgages Ltd* [1998] 1 FCR 282. The authorities referred to in this paragraph must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 Law of Property Act 1925 s 91(3). As to security for costs see **CIVIL PROCEDURE** vol 11 (2009) PARA 745 et seq.

3 Law of Property Act 1925 s 91(4). As to the meaning of 'incumbrancer' see PARA 223 note 4. As to the power to make a vesting order or appoint a person to convey, or to create and vest a mortgage term in the mortgagee, see s 91(7); and PARA 616. Cf s 90(1); and see PARA 625. As to priority between mortgagees see generally PARA 258 et seq.

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672. Costs.

In a claim for redemption the mortgagor, as a rule, pays his own costs. The mortgagee may add all costs, charges and expenses properly incurred in relation to the mortgaged property to his mortgage debt¹.

1 *Hewitt v Loosemore* (1851) 9 Hare 449; *Dunstan v Patterson* (1847) 2 Ph 341; *Cotterell v Stratton* (1872) 8 Ch App 295; *Re Sneyed, ex p Fewings* (1883) 25 ChD 338, CA; *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12, [1990] 2 All ER 577, CA; *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA. As to the mortgagee's proper costs, charges and expenses, his right to them and the circumstances in which he may be deprived of them if ordered to pay the mortgagor's costs made necessary by the mortgagee's misconduct see PARA 739 et seq.

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(4) MERGER

(i) When Merger takes Place

A. IN GENERAL

673. Nature of merger.

Merger may take the form of a merger of estates or of a merger of a charge in the land¹.

Where a charge on land and the ownership of the land become united in the same person, merger does not necessarily follow in equity², and the equitable rule now prevails³.

In general, merger of charges, like the merger of estates, is in equity a question of intention and this intention may be actual or presumed⁴. The sole exception to this rule is that where the owner of land pays off a charge which he is personally liable to pay, he is not allowed to set up the charge against subsequent incumbrancers to whom he is liable⁵. He may, however, do so when he has been discharged by bankruptcy from personal liability⁶; and where the first mortgage is also secured on property other than that of the person redeeming, it may be kept alive as to the other property⁷. In general, even though a charge is expressed to be extinguished, it may be treated as still in existence for the protection of the person finding the money to pay it off⁸; and where it has been extinguished under a misapprehension of title, it may be treated as in existence if this will be more in accordance with the general intention of the owner⁹. Where money advanced on the understanding that the lender is to have a first mortgage has been used to pay off an existing first mortgage, but owing to a mistake in the form of conveyance adopted the first mortgage has been discharged, it will nevertheless be treated as kept on foot for the protection of the new lender against a second mortgagee¹⁰.

1 2 Bl Com (14th Edn) 177; *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631 at 652, CA. There is no merger if the estates are held in different rights: *Lady Platt v Sleaf* (1611) Cro Jac 275; *Chambers v Kingham* (1878) 10 ChD 743; *Re Radcliffe, Radcliffe v Bewes* [1892] 1 Ch 227, CA. An estate of freehold is, in law, greater than a term of years, however long (3 Preston's Conveyancing 219); and where the reversion on a lease for 1,000 years has been granted for 500 years, this reversion is the greater estate, and the 1,000 years can be swallowed up in it (*Stephens v Bridges* (1821) 6 Madd 66). Now that the only estates capable of existing at law are the fee simple and a term of years (see the Law of Property Act 1925 s 1(1); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 45), the question can arise only with regard to the merger of a term of years in the fee, or of one term in another. As to merger generally see **EQUITY** vol 16(2) (Reissue) PARAS 764-769.

2 See **EQUITY** vol 16(2) (Reissue) PARAS 766-768.

3 This is because in any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity prevail: see the Senior Courts Act 1981 s 49(1); and **EQUITY** vol 16(2) (Reissue) PARA 500. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

4 As to such actual or presumed intention see *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244 at 249; *Thorne v Cann* [1895] AC 11 at 18-19, HL, per Lord Macnaghten; *Re Gibbon, Moore v Gibbon* [1909] 1 Ch 367 at 373. See also *Forbes v Moffatt* (1811) 18 Ves 384 at 390-392, per Grant MR. See further PARA 677 et seq; and **EQUITY** vol 16(2) (Reissue) PARAS 765, 767-768.

5 See *Otter v Lord Vaux* (1853) 6 De GM & G 638 at 642; *Platt v Mendel* (1884) 27 ChD 246 at 251; *Re W Tasker & Sons Ltd, Hoare v W Tasker & Sons Ltd* [1905] 2 Ch 587, CA; *Morrison v Guaranty Trust Co of Canada* [1972] 3 OR 448, 28 DLR (3d) 458. A statutory receipt does not operate as a transfer where there is no right to keep the mortgage alive: see the Law of Property Act 1925 s 115(3); and PARA 649.

6 *Re Howard's Estate* (1892) 29 LR Ir 266, CA.

7 *Taws v Knowles* [1891] 2 QB 564 at 572, CA.

8 *Irby v Irby (No 3)* (1858) 25 Beav 632; *Lord Gifford v Lord Fitzhardinge* [1899] 2 Ch 32. See also *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL.

9 *Earl of Buckinghamshire v Hobart* (1818) 3 Swan 186 at 202.

10 *Whiteley v Delaney* [1914] AC 132, HL. See also *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL.

674. Union of beneficial interests sufficient.

As merger depends on intention, and not on the mere legal union of the charge and the estate, it may take place even though the charge is supported by an outstanding legal estate¹. For merger to take place it is sufficient that the beneficial interest in the charge and the beneficial estate in the land meet in the same person, whether in either case they are accompanied by the legal interest or estate or not².

1 *Astley v Milles* (1827) 1 Sim 298 at 344; *Pitt v Pitt* (1856) 22 Beav 294.

2 *Forbes v Moffatt* (1811) 18 Ves 384 at 390 per Grant MR; *Donisthorpe v Porter* (1762) 2 Eden 162 at 164 per Lord Henley LC.

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B. MERGER IN PARTICULAR CASES

675. Charge united with fee simple.

The presumption in favour of merger arises when the absolute interest in the charges is united with the estate in fee simple in the land, whether the owner of the land acquired the charge before¹, or at the same time as², or after³, he became entitled to the land, unless the estate in fee simple is subject to an executory devise or is otherwise defeasible⁴, or the title is in dispute⁵. There is no advantage in keeping the charge alive⁶, and its extinguishment simplifies the title to the land⁷.

The presumption in favour of merger arises in these cases not only where the charge and estate devolve upon the same person, but also where the owner of the estate purchases⁸ or pays off⁹ the charge.

1 *Forbes v Moffatt* (1811) 18 Ves 384; *Swinfen v Swinfen (No 3)* (1860) 29 Beav 199 at 203. As to merger generally see PARA 673.

2 *Grice v Shaw* (1852) 10 Hare 76 at 79.

3 *Price v Gibson* (1762) 2 Eden 115; *Hood v Phillips* (1841) 3 Beav 513; *Pitt v Pitt* (1856) 22 Beav 294; *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244 at 249. In *Swabey v Swabey* (1846) 15 Sim 106, the mortgage was treated as existing for the purpose of probate and legacy duty, though merged as between heir and next of kin. See also *Re French-Brewster's Settlements*, *Walters v French-Brewster* [1904] 1 Ch 713.

4 *Drinkwater v Combe* (1825) 2 Sim & St 340.

5 *Re Pride, Shackell v Colnett* [1891] 2 Ch 135.

6 *Forbes v Moffatt* (1811) 18 Ves 384.

7 See *Donisthorpe v Porter* (1762) 2 Eden 162 at 163. Merger has been held to have taken place where the owner of the land was entitled to the charge, a portion, as next of kin to the portioner, and had not taken out administration to him (*Re French-Brewster's Settlements*, *Walters v French-Brewster* [1904] 1 Ch 713); and merger may result from the mortgagor taking the mortgage as the mortgagee's executor and having sufficient as beneficiary to pay off the mortgage (*Re Greg, Fordham v Greg* [1921] 2 Ch 243).

8 *Astley v Milles* (1827) 1 Sim 298.

9 *Earl of Buckinghamshire v Hobart* (1818) 3 Swan 186.

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676. Where limited owner acquires charge, or charge is not absolute.

The presumption is against merger where a tenant for life or other limited owner (not being tenant in tail¹) acquires or pays off a charge, as the merger would operate as a gift to those in remainder². This presumption against merger has been held to exist notwithstanding that the reconveyance to the tenant for life was expressed to be absolutely discharged from the mortgage debt³. A presumption against merger also applies where the charge is subject to limitations which prevent the full union of the charge and the estate in the lifetime of the owner (for example, where the charge is subject to a prior life interest which does not terminate during the life of the owner in fee simple)⁴. In such cases, it is not necessary to take an assignment of the charge⁵, or to prove any intention on the part of the tenant for life to keep the charge alive⁶.

Where the tenant for life has had an ultimate remainder in fee simple, which, by the failure of intermediate estates, falls into possession on his death, there is no merger. The presumption against merger raised by his tenancy for life continues in the absence of any proof to the contrary⁷.

1 *Morley v Morley* (1855) 5 De GM & G 610 at 620.

2 *Burrell v Earl of Egremont* (1844) 7 Beav 205 at 232; *Pitt v Pitt* (1856) 22 Beav 294; *Lindsay v Earl of Wicklow* (1873) 7 IR Eq 192 at 204; *Williams v Williams-Wynn* (1915) 84 LJCh 801. As to merger generally see PARA 673.

3 *Lord Gifford v Lord Fitzhardinge* [1899] 2 Ch 32.

4 *Jones v Morgan* (1783) 1 Bro CC 206; *Wilkes v Collin* (1869) LR 8 Eq 338.

5 *Morley v Morley* (1855) 5 De GM & G 610 at 626; and see *Redington v Redington* (1809) 1 Ball & B 131.

6 *Lindsay v Earl of Wicklow* (1873) 7 IR Eq 192 at 204.

7 *Wyndham v Earl of Egremont* (1775) Amb 753; *Trevor v Trevor* (1833) 2 My & K 675. Where, however, the tenancy for life and the remainder in fee were separated only by special powers to appoint to issue and general powers vested in the tenant for life, and the tenant for life was at her death a spinster over 70 years of age, an intention to merge was presumed: *Re Toppin's Estate* [1915] 1 IR 330, CA.

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C. SUFFICIENT REBUTTAL OF PRESUMPTION IN FAVOUR OF OR AGAINST MERGER

677. Rules as to presumption yield to intention.

The rules as to the presumption in favour of or against merger yield to the intention, and this may be actual or presumed¹. The actual intention is to be gathered either from express declaration or the person's acts, and the presumed intention by considering what is most for his benefit².

1 *Forbes v Moffatt* (1811) 18 Ves 384 at 390; *Grice v Shaw* (1852) 10 Hare 76 at 79. As to merger generally see PARA 673.

2 *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244 at 249. This applies both to the original presumption and to the rebutting presumption. Where a tenant in fee simple pays off a charge, the original presumption is in favour of merger: see PARA 675. Where under the circumstances it is for his advantage to keep the charge alive, there may be a rebutting presumption which prevents merger: see PARA 681.

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678. Express declaration against merger.

The clearest way of causing or preventing merger is by express declaration in the instrument which effects the union of the charge and the estate¹. Even an express declaration against merger will not, however, keep the charge alive if there are circumstances pointing conclusively to merger².

1 See *Re Gibbon, Moore v Gibbon* [1909] 1 Ch 367 at 373. In this case, although the declaration was expressed to keep the charge alive for the benefit of the owner, his heirs and assigns, it passed on his death as personal estate (*Re Gibbon, Moore v Gibbon* at 378-379); and where, subsequently to a proviso in a conveyance of the land that the land is to be the primary fund for payment of the charge, the grantor pays it off, it will be kept alive as part of his personal estate (*Pears v Weightman* (1856) 2 Jur NS 586). Cf *Johnson v Webster* (1854) 4 De GM & G 474. As to merger generally see PARA 673.

2 *Re Gibbon, Moore v Gibbon* [1909] 1 Ch 367 at 374. See also *Swabey v Swabey* (1846) 15 Sim 106.

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679. Intention inferred from circumstances attending union.

Where there is no express declaration, an actual intention can be inferred from the circumstances attending the union of the charge and the estate. The contemporaneous transfer of the charge to a trustee is one of the grounds on which an actual intention can be inferred and the presumption in favour of merger rebutted¹, but by itself it is not decisive against merger².

1 *Earl of Buckinghamshire v Hobart* (1818) 3 Swan 186 at 199. As to merger generally see PARA 673.

2 *Hood v Phillips* (1841) 3 Beav 513; *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244; *Re Lloyd's Estate* [1903] 1 IR 144 at 148. As to a merger of a lease cf *Gunter v Gunter* (1857) 23 Beav 571.

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680. Intention inferred from indications occurring subsequent to union.

Where the union of the interests takes place otherwise than by the intended acquisition of the charge or estate, or payment off of the charge, so that no indications of intention can exist at the time of union, it is permissible to rely on any such indications occurring subsequently during the life of the owner¹, but apparently not on expressions of intention previous to the union of the interests². Merger will be prevented by any acts done by the owner which are only consistent with the charge being kept on foot³. Similarly, merger will be effected where the owner has disposed of the land free from incumbrances, whether by sale⁴, mortgage⁵ or marriage settlement⁶. In such cases, he cannot set up the charge notwithstanding a clear expression of intention to keep it alive at the time he took it⁷. There will also be a merger where he has devised the estate in such a manner as to show that he treated the charge as non-existing⁸, but a devise of the estate in such terms as to merge charges will not merge them so far as they form a security for subsequent charges made by the owner⁹. Where a tenant for life pays off an incumbrance, intending to discharge the inheritance, he cannot afterwards revive it¹⁰.

1 *Redington v Redington* (1809) 1 Ball & B 131 at 143; *Swinfen v Swinfen (No 3)* (1860) 29 Beav 199 at 204; *Re Godley's Estate* [1896] 1 IR 45 at 51. As to merger generally see PARA 673.

2 *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244 at 251.

3 *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244. See also *Hatch v Skelton* (1855) 20 Beav 453; *Lea v Thursby* [1904] 2 Ch 57 at 65; *Re Fletcher, Reading v Fletcher* [1917] 1 Ch 339, CA.

4 *Bulkeley v Hope* (1855) 1 K & J 482 at 489. See also **EQUITY** vol 16(2) (Reissue) PARA 768.

5 *Tyler v Lake* (1831) 4 Sim 351; *Re Gibbon, Moore v Gibbon* [1909] 1 Ch 367 at 374.

6 *Countess Dowager of Gower v Earl of Gower* (1783) 1 Cox Eq Cas 53.

7 *Countess Dowager of Gower v Earl of Gower* (1783) 1 Cox Eq Cas 53.

8 See *Hood v Phillips* (1841) 3 Beav 513; *Re Lloyd's Estate* [1903] 1 IR 144 at 149.

9 *Re Nunn's Estate* (1888) 23 LR Ir 286 at 300, CA.

10 *Morley v Morley* (1855) 5 De GM & G 610 at 626; *Re Godley's Estate* [1896] 1 IR 45 at 52.

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681. Presumption where merger not beneficial to owner.

Where there is no evidence of any actual intention, an intention to keep the charge alive, notwithstanding that it would prima facie merge, may be presumed where this is for the benefit of the owner¹ (for example, where the merger of the charge would let in subsequent charges²,

unless the subsequent charges have been created by the owner himself³). The result is in fact based directly on the advantage to the owner, but technically it is based on the presumed intention⁴.

1 *Swinfen v Swinfen (No 3)* (1860) 29 Beav 199 at 204. See also *Earl of Clarendon v Barham* (1842) 1 Y & C Ch Cas 688 at 703.

2 *Forbes v Moffatt* (1811) 18 Ves 384; *Davis v Barrett* (1851) 14 Beav 542; *Whiteley v Delaney* [1914] AC 132, HL; *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 2 All ER 865, PC.

3 *Johnson v Webster* (1854) 4 De GM & G 474 at 488. As to merger generally see PARA 673.

4 *Grice v Shaw* (1852) 10 Hare 76 at 80; *Byam v Sutton* (1854) 19 Beav 556 at 562.

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682. Presumed intention operative despite owner's ignorance or incapacity.

The fact that the owner of the estate is ignorant of his rights prevents him from having any actual intention as to merger, but the presumed intention may still operate, according to the circumstances, either to effect or to prevent merger¹.

Where the owner is under incapacity, the question of merger as a rule depends technically on the presumed intention but actually on considering what is most advantageous to him².

1 *Burrell v Earl of Egremont* (1844) 7 Beav 205 at 232; but see *Whiteley v Delaney* [1914] AC 132, HL. As to merger generally see PARA 673.

2 *Forbes v Moffatt* (1811) 18 Ves 384 at 392.

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683. Right of purchaser to keep charge alive.

Prima facie where a mortgagee purchases the equity of redemption, or where, on a purchase, part of the purchase money is applied in paying off a mortgage, or where the mortgage and the equity of redemption become united by purchase in the same person, the mortgage is merged in the land¹; but the person thus entitled to both interests can have the mortgage kept alive for his benefit². A person advancing money to pay off a charge is entitled to have the charge kept alive and transferred to himself³, and such a transfer should be a transfer both of the debt and the security⁴.

1 See *Smith v Phillips* (1837) 1 Keen 694. As to merger generally see PARA 673.

2 *Clark v May* (1852) 16 Beav 273; *Cooper v Cartwright* (1860) John 679.

3 *Manks v Whiteley* [1912] 1 Ch 735 at 743, CA, per Cozens-Hardy MR; revsd on other grounds sub nom *Whiteley v Delaney* [1914] AC 132, HL. As to forms of transfer see PARA 365 et seq. As to transfer by statutory receipt see PARA 649.

4 *Medley v Horton* (1844) 14 Sim 222 at 229.

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684. Acquisition of charge by subrogation.

Where the purchase money is applied in paying off a mortgage, but the mortgage is not transferred, it may be treated as subsisting to prevent unjust enrichment under the doctrine of subrogation¹. In older cases it was said that the purchaser is entitled to keep the mortgage alive as against subsequent incumbrances by an actual intention to that effect, and treated as a question of merger². The phrase 'keeping the charge alive' is not, however, literally true since the charge is discharged³. When a charge is said to be kept alive for the benefit of a claimant, what is meant is his legal relations with a defendant, who would otherwise be unjustly enriched, are regulated as if the benefit of the charge had been assigned to him⁴. The claimant is not to be treated as an assignee in relation to someone who would not be unjustly enriched⁵. Furthermore, unjust enrichment does not depend on intention, although intention may be relevant to whether enrichment was unjust⁶.

1 As to the circumstances in which the remedy of subrogation is available see PARA 384.

2 *Watts v Symes* (1851) 1 De GM & G 240 at 244; *Hayden v Kirkpatrick* (1865) 34 Beav 645; *Adams v Angell* (1876) 5 ChD 634 (affd (1877) 5 ChD 634, CA); *Re Cork Harbour Docks and Warehouse Co's Estate* (1885) 17 LR Ir 515, Ir CA; *Minter v Carr* [1894] 3 Ch 498 at 501, CA; *Thorne v Cann* [1895] AC 11 at 19, HL; *Whiteley v Delaney* [1914] AC 132, HL; *Parkash v Irani Finance Ltd* [1970] Ch 101, [1969] 1 All ER 930. The rule was also applied where a new mortgagee is making an advance to pay off the old mortgage: *Phillips v Gutteridge* (1859) 4 De G & J 531; *Butler v Rice* [1910] 2 Ch 277. As to merger generally see PARA 673.

3 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL.

4 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL.

5 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL.

6 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL; and see PARAS 384-385.

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685. Registered land.

The legal estate created by a charge over registered land is deemed to be vested in the registered proprietor as a result of the registration¹. It therefore continues to subsist until discharged, notwithstanding payment².

- 1 See the Land Registration Act 2002 s 58; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 859.
- 2 As to discharge see PARA 647.

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(ii) Merger of Lower in Higher Security

686. General rule.

As a general rule, by taking or acquiring a security of a higher nature in legal valuation than one he already possesses, a person merges and extinguishes his legal remedies upon the inferior security or cause of action; thus the taking of a bond or covenant, or the obtaining of a judgment for a simple contract debt, merges and extinguishes the simple contract debt¹. For this purpose, however, the superior security must be co-extensive with the inferior security and between the same parties². A security given by one of two co-debtors to secure a simple contract debt does not merge the simple contract debt³.

1 *Owen v Homan* (1851) 3 Mac & G 378 at 407; affd (1853) 4 HL Cas 997. As to interest recoverable see PARA 731. A judgment does not prevent a petition in bankruptcy on the original debt: see *Re Mostyn, ex p Griffiths* (1853) 3 De GM & G 174. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 134.

2 *Holmes v Bell* (1841) 3 Man & G 213; *Norfolk Rly Co v M'Namara* (1849) 3 Exch 628.

3 *Bell v Banks* (1841) 3 Man & G 258; *Ansell v Baker* (1850) 15 QB 20; *Sharpe v Gibbs* (1864) 16 CBNS 527; *Boaler v Mayor* (1865) 19 CBNS 76; *Westmoreland Green and Blue Slate Co v Feilden* [1891] 3 Ch 15 at 26, CA.

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687. Effect of judgment.

The obtaining of a judgment for the mortgage debt does not, while the judgment remains unsatisfied¹, prevent the mortgagee from enforcing his security².

1 *Lloyd v Mason* (1845) 4 Hare 132 at 138; *O'Brien v Lewis* (1863) 3 De GJ & Sm 606. See also *Re Lonergan, ex p Sheil* (1877) 4 ChD 789 at 793, CA.

2 A mortgagee is entitled to pursue his remedies simultaneously: see PARA 514.

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688. Effect of legal mortgage on equitable charge.

A mere charge or equitable mortgage is extinguished by the taking of a formal mortgage, even though the mortgage does not confer a legal estate, and the sum from then on secured is the

sum mentioned in the mortgage notwithstanding that other sums were covered by the deposit¹. However, an equitable security is not merged by taking a security which is ineffectual².

1 *Vaughan v Vanderstegen* (1854) 2 Drew 289; *Bristol & West plc v Bartlett* [2002] EWCA Civ 1181, [2002] 4 All ER 544, [2003] 1 WLR 284.

2 *Re Emery, ex p Harvey* (1839) Mont & Ch 261. See also *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 2 All ER 865, PC.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(4) MERGER/(ii) Merger of Lower in Higher Security/689. Merger prevented by the contract.

689. Merger prevented by the contract.

Merger may be prevented by an express or implied intention to the contrary¹. Thus an assignment made by way of further security cannot prejudice the continuance of any existing security for the same debt², and a mortgage is not merged by the taking of a new mortgage on the same property to cover the original debt and further advances³. A covenant to pay interest can be so expressed as not to merge in a judgment⁴.

1 As to merger generally see PARA 673.

2 *Twopenny v Young* (1824) 3 B & C 208; *Boaler v Mayor* (1865) 19 CBNS 76 at 83; and see *Re Warwick and Clagett, ex p Whitmore* (1838) 3 Deac 365. It seems, however, that a covenant to pay a simple contract debt necessarily turns it into a specialty debt (see *Stamps Comr v Hope* [1891] AC 476, PC); and an agreement under seal to execute a mortgage to secure a simple contract debt turns it into a specialty debt (see *Saunders v Milsome* (1866) LR 2 Eq 573; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 251). As to collateral securities see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1199.

3 *Tenison v Sweeny* (1844) 1 Jo & Lat 710 at 717; *Re James, ex p Harris* (1874) LR 19 Eq 253; cf *Re Dix, ex p Whitbread* (1841) 2 Mont D & De G 415.

4 As to covenants to pay interest see PARA 731.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(5) RELEASE/690. Release of the debt.

(5) RELEASE

690. Release of the debt.

By releasing the debt the security for the debt is released¹. To be binding a release of a debt must generally be made for consideration², or, if not so made, under seal³. While an alleged release or forgiveness of the debt cannot be established merely by showing that the creditor had expressed an intention to release the debt, where the creditor has so acted that the debtor has done acts by which his position has been altered the creditor will not be allowed to enforce his security⁴. Moreover, a declaration of present forgiveness of the debt, even though only oral and unsupported by consideration, may be effective to release the debt, if it is accompanied by the delivery of the deeds to the debtor⁵; and if the mortgagee declares himself a trustee of the mortgaged premises for the mortgagor this is equivalent to a release⁶.

A release of the debt is usually made on the disposition of the whole of the equity of redemption, either on sale, or, for example, on its transfer to new trustees⁷. The purchaser or other assignee of the equity of redemption is not liable on the covenant for payment⁸, and the mortgagor remains liable, but the assignee will be liable to indemnify the mortgagor even if there is no express indemnity covenant⁹. On a disposition of the equity of redemption the mortgagee may release the mortgagor or his successor in title from the mortgage debt in consideration of a covenant by the purchaser or donee, or, if applicable, the new trustees, for payment and to observe and perform the mortgagor's covenants in the mortgage deed. The release and covenant may be included in the transfer or be effected by a separate document¹⁰.

1 Shep Touch 342; *Cowper v Green* (1841) 7 M & W 633.

2 See eg *Taylor v Manners* (1865) 1 Ch App 48. As to consideration see **CONTRACT** vol 9(1) (Reissue) PARA 727.

3 As to deeds under seal see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 27 et seq. See also **CONTRACT** vol 9(1) (Reissue) PARAS 616, 727.

4 *Yeomans v Williams* (1865) LR 1 Eq 184. This will be more readily applied to the release of interest than principal, because the intention to release the principal would probably be evidenced by the giving up of the security.

5 Such an oral declaration may also be effective where the debtor becomes the creditor's personal representative (*Strong v Bird* (1874) LR 18 Eq 315), so long as the intention to forgive continued until the creditor's death (*Re Wale, Wale v Harris* [1956] 3 All ER 280, [1956] 1 WLR 1346).

6 *Re Hancock, Hancock v Berrey* (1888) 57 LJCh 793.

7 As to the equity of redemption see PARA 302 et seq.

8 *Re Errington, ex p Mason* [1894] 1 QB 11. See also PARA 540.

9 *Waring v Ward* (1802) 7 Ves 332. See also PARA 540.

10 As to release of debts by will see **WILLS** vol 50 (2005 Reissue) PARA 588. The appointment of a debtor as executor may extinguish the cause of action in debt, but the executor may remain liable under an equitable obligation to account to those interested in the estate for the amount of the debt: see *Stamp Duties Comr v Bone* [1977] AC 511, [1976] 2 All ER 354, PC.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(5) RELEASE/691. Release of the security.

691. Release of the security.

On payment of the mortgage money, a mortgage term becomes a satisfied term and a legal charge is discharged¹. Strictly speaking, therefore, where the whole of the mortgage money is paid, no further documentation is required although this is desirable from the practical point of view of proof of the intent to discharge.

In the case of a mortgage by demise, the legal estate may be released or surrendered only by deed or by operation of law² although an agreement to surrender which complies with the required formalities is effective in equity³. An informal surrender may be effective where, for example, the mortgagee hands back the mortgage deed and treats the mortgage as at an end⁴.

The form of the release of property secured by legal mortgage depends on the circumstances. Usually it is made for value to enable the mortgagor to sell the property. In such circumstances the mortgagee may join in the conveyance rather than making a statutory receipt, where that is appropriate, or a separate deed of surrender or release followed by the conveyance. Where

the mortgagee joins in the conveyance, then unless the property, if any, remaining in mortgage is sufficient security for the mortgage debt he will usually require the whole or part of the purchase money to be paid to him in discharge or reduction of the mortgage debt.

Where a sale of the property to be released is not contemplated, the appropriate Land Registry form should be used in the case of registered land⁵. Where the land is not registered a statutory receipt should be used, if the release is in consideration of the repayment of the money secured by the mortgage, but otherwise a deed of surrender, where the mortgage was by demise or sub-demise, or release, in the case of charge, is appropriate⁶.

1 See PARA 642.

2 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and PARA 118.

3 *Walsh v Lonsdale* (1882) 21 ChD 9, CA.

4 *Haigh v Brooks* (1839) 10 Ad & El 309. This decision may now be regarded as an example of estoppel or an equitable surrender which did not need to be in writing.

5 See PARA 647.

6 Debentures are released in the appropriate manner according to what sort of charge had been created (ie legal charge, equitable charge or floating charge). Any land charge registration in respect of the mortgage should be cancelled. As to statutory receipts see PARA 645.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(5) RELEASE/692. Release of security under equitable mortgage.

692. Release of security under equitable mortgage.

An equitable mortgage does not create any legal estate or interest in favour of the mortgagee and no formal deed of release is required¹. A release of the whole of the security may be effected by the cancellation of the mortgage or a simple receipt². The release of part of equitably mortgaged property is generally effected by a written statement or letter from the mortgagee that he has no charge on the particular property³.

1 As to equitable mortgages see PARA 105.

2 See PARA 644.

3 But see 26 Conv (NS) (1962) 449-453. For property subject to a floating charge, a letter of non-crystallisation from some officer of the company or its solicitor suffices. As to floating charges see **COMPANIES** vol 15 (2009) PARA 1269 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(5) RELEASE/693. Partial discharge of security by trustee-mortgagee.

693. Partial discharge of security by trustee-mortgagee.

A trustee-mortgagee may release part of his security on receipt of the whole of the purchase money produced thereby¹.

¹ *Re Morrell and Chapman's Contract* [1915] 1 Ch 162. As to the position of a purchaser of mortgaged land who has notice that the mortgagees are trustees see the Law of Property Act 1925 s 113; and PARA 373.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(5) RELEASE/694. Partial discharge of leasehold property.

694. Partial discharge of leasehold property.

The statutory provisions as to the realisation of leasehold mortgages¹ do not apply where the mortgage term does not comprise the whole of the land included in the leasehold reversion, unless the rent, if any, payable in respect of that reversion has been apportioned, either legally or informally, as respects the land affected, or the rent is of no money value or no rent is reserved, and unless the lessee's covenants and the conditions, if any, have been apportioned either expressly or by implication, as respects the land affected². Accordingly a release should never be executed as to part of mortgaged leaseholds without such an apportionment.

¹ See the Law of Property Act 1925 s 89: see PARAS 446-448.

² See the Law of Property Act 1925 s 89(6); and PARA 448.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(5) RELEASE/695. Release from judgment of part of land affected.

695. Release from judgment of part of land affected.

A release from a judgment, including a charging order, of part of any land¹ charged with it does not affect the judgment charge as respects any land not specifically released².

¹ As to the meaning of 'land' see PARA 104 note 2.

² Law of Property Act 1925 s 71(1). These provisions operate without prejudice to the rights of any persons interested in the property remaining unreleased and not concurring in or confirming the release: s 71(2).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(5) RELEASE/696. Release of surety.

696. Release of surety.

The fact that a creditor accepts further security from the principal debtor does not release a surety¹, but a surety is entitled to the benefit of a collateral security². A release of the collateral security will release the surety³. The rights of the surety may be, and usually are, modified or excluded by agreement⁴.

¹ *Twopenny v Young* (1824) 3 B & C 208; *Eyre v Everett* (1826) 2 Russ 381 at 384.

² *Dixon v Steel* [1901] 2 Ch 602.

³ *Pearl v Deacon* (1857) 1 De G & J 461.

- 4 See generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1221, 1224.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(6) WAIVER/697. Nature of waiver.

(6) WAIVER

697. Nature of waiver.

As regards the debt itself, a waiver is ineffectual unless it amounts to a release¹, but the rights of the creditor under his security may be varied by waiver, provided he is cognisant of his rights². Waiver may be express or implied³.

1 A mere waiver signifies nothing more than an expression of intention not to insist on the right and as such is unenforceable: *Stackhouse v Barnston* (1805) 10 Ves 453. But the claimant's conduct may be such as to estop him from asserting the continuance of the liability: *Yeomans v Williams* (1865) LR 1 Eq 184.

2 *Vyvyan v Vyvyan* (1861) 30 Beav 65 (affd 4 De GF & J 183). See also *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA. See further **EQUITY** vol 16(2) (Reissue) PARA 908.

3 See generally **EQUITY** vol 16(2) (Reissue) PARA 907.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(6) WAIVER/698. Express waiver.

698. Express waiver.

The extent of an express waiver is governed by the language used¹. If the waiver is clearly limited to part of the security, the mortgagee's rights over the remainder of the security will be unaffected. Accordingly, where a mortgagee surrendered his legal interest in a leasehold security to enable the mortgagor to provide another security, but stipulated that the surrender was without prejudice to any other security he might have for his debt, he and his assignee were held to be still entitled to the benefit of the covenants in the mortgage, the legal interest only, and not the covenants, being within the operation of the surrender². If the waiver is on the face of it clearly a general one, it will not be restricted on the representation of one of the parties that a more limited one was intended³.

1 See generally **EQUITY** vol 16(2) (Reissue) PARA 907.

2 *Greenwood v Taylor* (1845) 14 Sim 505; revsd sub nom *A-G v Cox*, *Pearce v A-G* (1850) 3 HL Cas 240.

3 *Drought v Jones* (1840) 4 Dr & War 174.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(6) WAIVER/699. Implied waiver.

699. Implied waiver.

There can be a waiver of a debt only if the creditor is aware of his rights¹. The court will not be anxious to imply waiver from a mere omission, or other circumstances, from which the intention cannot fairly be inferred². Thus where it was provided by the mortgage deed that, as between the mortgagor and his surety, a certain part of the security given by the principal should be primarily liable to the debt, without mentioning the rest, it was held that on paying off the debt the surety had not lost, by the omission, the right to a transfer of the whole security³.

1 See PARA 697; and **EQUITY** vol 16(2) (Reissue) PARAS 907-908.

2 The sale by a mortgagee of mortgaged chattels discharged a collateral security of land in *Greenberg v Rapoport* (1970) 10 DLR (3d) 737.

3 *Bowker v Bull* (1850) 1 Sim NS 29.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(6) WAIVER/700. Taking additional security.

700. Taking additional security.

If a creditor having a security on the funds of his debtor for part of his debt takes another security on the same funds for his whole debt, the earlier debt keeps its force and may be separately dealt with¹. Similarly, where a creditor, having a security upon his debtor's funds takes afterwards, either alone (but on behalf of himself and another creditor), or jointly with such other creditor, a security for both debts on the same funds, the separate security keeps its force and may be separately dealt with. Where the surety pays off the debt or interest in arrear and his payment has been included in the security of a subsequent mortgagee, the surety having taken a note from that mortgagee to that effect, an intention by the surety to take an additional security, and not a waiver of his old right, is to be inferred².

1 See *Miln v Walton* (1843) 2 Y & C Ch Cas 354, where a lien on the freight of a ship arose from the discounting of bills of exchange.

2 *Beckett v Booth* (1708) 2 Eq Cas Abr 595; and see *Martin v Sedgwick* (1846) 9 Beav 333. As to waiver see PARA 697.

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701. Taking substituted security.

Where it is contended that the benefit of a security has been waived by the acceptance of another security in its place, it is for the owner of the estate to show that it was discharged by the taking of the new security and not for the creditor to disprove the substitution of the new security for the old¹. The mere acceptance of a personal security for interest in arrear, or other charge whether express or implied, is therefore not a waiver of the original security, even if a receipt is given for the amount². The absence of any mention of the original security, and the reservation of interest at a different rate from that which was secured by it, have been treated as evidence that the new security was taken by way of substitution³.

1 As to waiver see PARA 697.

2 *Barret v Wells* (1700) Prec Ch 131; *Hardwick v Mynd* (1793) 1 Anst 109; *Curtis v Rush* (1814) 2 Ves & B 416; *Saunders v Leslie* (1814) 2 Ball & B 509. It is uncertain whether this rule applies as against a purchaser for value of a subsequent interest in the estate on the faith of an assurance, supported by the receipt, that no interest was due: see *Kemmis v Stepney* (1828) 2 Mol 85.

3 *Re Brettle, Brettle v Burdett* (1864) 2 De GJ & Sm 244.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(7) DISCHARGE OR MODIFICATION BY STATUTE/702. Compulsory acquisition by tenants of landlord's interest.

(7) DISCHARGE OR MODIFICATION BY STATUTE

702. Compulsory acquisition by tenants of landlord's interest.

In some circumstances, where a landlord has disposed of property, certain tenants have a right to serve a notice on the purchaser requiring him to dispose of the estate or interest that was the subject matter of the original disposal to the tenants¹. If the property has at any time since the original disposal become subject to any charge or mortgage, then, unless the court directs otherwise, the instrument by virtue of which the property is disposed of by the purchaser operates to discharge the property from that charge or mortgage².

Other categories of tenant³ may apply to the court for an acquisition order enabling a person nominated by them to acquire their landlord's interest in the premises without his consent⁴. Where the landlord's interest in any premises is acquired in pursuance of an acquisition order, the instrument by virtue of which it is acquired operates to discharge from the premises any existing charge or mortgage⁵.

1 See the Landlord and Tenant Act 1987 s 12B; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARAS 1772-1773. As to the tenants who are qualifying tenants for these purposes see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1748.

2 See the Landlord and Tenant Act 1987 s 12B(5)(a), (6), Sch 1 Pt I; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1773.

3 As to the qualifying tenants for these purposes see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1748.

4 See the Landlord and Tenant Act 1987 s 25(1); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1783.

5 See the Landlord and Tenant Act 1987 s 32, Sch 1 Pt II; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1790 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(7) DISCHARGE OR MODIFICATION BY STATUTE/703. Compulsory acquisition of mortgaged land.

703. Compulsory acquisition of mortgaged land.

Where land which is to be acquired compulsorily is subject to a mortgage, the undertakers or acquiring authority may purchase or redeem the mortgagee's interest in the land, whether or

not they have previously purchased the equity of redemption, or the mortgagee is a trustee, or he is in possession of the land, or the mortgage includes other land in addition to that to be acquired¹. An acquiring authority is under no obligation to redeem the mortgage, although it is entitled to². On redemption of the mortgage, the mortgagee must convey or release his interest in the land to the undertakers or acquiring authority or as the undertakers or authority may direct³.

1 See the Lands Clauses Consolidation Act 1845 ss 108-114 (where that Act is incorporated: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 509); the Compulsory Purchase Act 1965 ss 14-17 (where that Act applies: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 513); and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 712. As to the compulsory acquisition of mortgaged land see further **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 711-714.

2 *Shewu v Hackney London Borough Council* (1999) 79 P & CR 47, CA.

3 See the Lands Clauses Consolidation Act 1845 s 108; the Compulsory Purchase Act 1965 s 14(2), (3); and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 712.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/11. DISCHARGE OF MORTGAGES/(7) DISCHARGE OR MODIFICATION BY STATUTE/704. Enfranchisement of leaseholds where freehold mortgaged.

704. Enfranchisement of leaseholds where freehold mortgaged.

Where a conveyance is executed in pursuance of a tenant's statutory right¹ to acquire the freehold of the leasehold house occupied by him, it operates to discharge the property from any charge on the landlord's estate to secure the payment of money, and to extinguish any term of years created for the purpose of the charge, and it does so without the persons entitled to or interested in the charge or term of years becoming parties to the conveyance².

Where a conveyance is executed in pursuance of the statutory right of tenants of flats to have the freehold acquired on their behalf³, it is effective: (1) to discharge the interest from the mortgage, and from the order made by a court for the enforcement of the mortgage; and (2) to extinguish any term of years created for the purposes of the mortgage⁴.

1 Ie under the Leasehold Reform Act 1967: see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1389 et seq.

2 See the Leasehold Reform Act 1967 s 12(1); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1462. As to the effect of such discharge and the tenant's duties and powers with respect to the application of the purchase money see ss 12, 13; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARAS 1462-1464. As to the relief available in certain circumstances to the landlord or mortgagee see s 36; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1464.

3 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt 1 (ss 1-103): see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1552 et seq.

4 See the Leasehold Reform, Housing and Urban Development Act 1993 s 35, Sch 8; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1652 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(1) GENERAL ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/705. Nature of general accounts.

12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE

(1) GENERAL ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE

705. Nature of general accounts.

The relationship of mortgagor and mortgagee is terminated by redemption, foreclosure, or the accounting for the proceeds of realisation, and proceedings for any of these purposes involve the taking of an account between the mortgagor and mortgagee¹. In such an account the mortgagor is debited with principal and interest², and also with the costs, charges and expenses incurred by the mortgagee in relation to the mortgage security³. It may be necessary first to construe the mortgage deed, and in the case of a building society mortgage also the society's rules⁴, in order to settle the basis of the account.

The mortgagor is not debited with rents and profits which he has received while allowed to continue in possession⁵, nor, on the other hand, is he credited with any money which he has expended on the repair or improvement of the property⁶. Where, however, the mortgagee is restrained from taking possession and a receiver is appointed adversely to him, the receiver may be charged with an occupation rent⁷. The mortgagor is credited with any sums which the mortgagee has received on account of the security, and the balance appearing to his debit is the sum at which he is entitled to redeem in a redemption claim⁸, or to redeem, so as to prevent foreclosure, in a foreclosure claim⁹. If the property has been realised, the balance, if any, appearing to his credit is the sum which the mortgagee must pay over to him¹⁰.

Although the direction to account does not in terms extend to future receipts, sums subsequently received must be brought into the account¹¹. Where the foreclosure is reopened the mortgagee is not necessarily bound to account for rents and profits received since the foreclosure¹².

1 See PARAS 570, 592-593, 616, 667. As to the jurisdiction to order an account see **EQUITY** vol 16(2) (Reissue) PARAS 449-455, 551. As to the time for which an account will be granted see **LIMITATION PERIODS** vol 68 (2008) PARAS 952, 1008. As to proceedings for redemption see PARA 656 et seq. As to foreclosure generally see PARA 566 et seq. As to the procedure for taking an account see *Practice Direction--Accounts, Inquiries etc* PD 40; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1524 et seq.

2 As to accounts of principal and interest see PARA 723 et seq.

3 See *Re Wallis, ex p Lickorish* (1890) 25 QBD 176 at 181, CA; and PARA 739 et seq.

4 As to the rules of building societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1878 et seq.

5 See PARA 341 et seq. As to the account taken against a mortgagee in possession see PARA 714.

6 *Norris v Caledonian Insurance Co* (1869) 17 WR 954.

7 *Re Joyce, ex p Warren* (1875) 10 Ch App 222. As to the appointment of receivers out of court see PARA 475 et seq; and as to the appointment of receivers by the court see PARA 560 et seq.

8 See PARA 324 et seq.

9 See PARA 566 et seq.

10 See PARA 472.

11 *Bulstrode v Bradley* (1747) 3 Atk 582.

12 *Bird v Gandy* (1715) 2 Eq Cas Abr 251 note (4).

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706. Form of the account.

The ordinary form of judgment for foreclosure or redemption¹ contains a direction that an account be taken of what is due to the mortgagee under his mortgage, and for the costs of the claim². A judgment in proceedings to recover surplus proceeds of sale requires the like account, and also an account of the proceeds of sale. A claim involving an account against a mortgagee as such must be limited to the mortgage account³. Where an account is asked for, the mortgagee is not generally ordered to give particulars of his claim⁴, but this may be done if he is in effect claiming a definite sum⁵. In each case, it has to be considered whether any special inquiries or accounts are required⁶, such as accounts of rents and profits against the mortgagee in possession⁷, of costs, charges and expenses⁸, of sums expended in lasting improvements⁹, as to deterioration of mortgaged property¹⁰ or as to sale at insufficient price¹¹. In foreclosure proceedings the prosecution of accounts and inquiries may be stayed until security is given if, owing to the sum due and a deficiency in the value of the property, they will be useless¹². The mortgagee of a partner's share is entitled to an account¹³.

1 As to foreclosure generally see PARA 566 et seq. As to the equity of redemption see PARA 302 et seq; and as to proceedings for redemption see PARA 656 et seq. As to the procedure for taking an account see *Practice Direction--Accounts, Inquiries etc* PD 40; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1524 et seq.

2 See PARA 592 et seq.

3 *Pearse v Hewitt* (1835) 7 Sim 471.

4 *Augustinus v Nerinckx* (1880) 16 ChD 13, CA; *Blackie v Osmaston* (1884) 28 ChD 119, CA.

5 *Kemp v Goldberg* (1887) 36 ChD 505.

6 See PARAS 592-593.

7 See PARAS 714-722.

8 See PARA 739 et seq.

9 See PARAS 434-435, 667, 745.

10 See PARAS 436-439, 667.

11 See PARA 458.

12 *Exchange and Hop Warehouses Ltd v Association of Land Financiers* (1886) 34 ChD 195; *Taylor v Mostyn* (1883) 25 ChD 48, CA.

13 *Watts v Driscoll* [1901] 1 Ch 294, CA. As to a mortgage of a partnership share see PARA 166.

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707. Account taken by second mortgagee.

An account taken against a first mortgagee at the instance of a second mortgagee must be taken in all respects as though the mortgagor were taking it¹. If the mortgagor would have an equity to exclude any item in the account, this equity can be asserted by the second mortgagee².

1 *Mainland v Upjohn* (1889) 41 ChD 126 at 136. See also *Melbourne Banking Corpn v Brougham* (1882) 7 App Cas 307 at 311, PC.

2 *Mainland v Upjohn* (1889) 41 ChD 126 at 136. See also *Melbourne Banking Corpn v Brougham* (1882) 7 App Cas 307 at 311, PC.

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708. General principle as to application of money.

Where the mortgagor is indebted to the mortgagee on accounts other than the mortgage, the mortgagee is not at liberty to appropriate sums received by virtue of the mortgage to those other accounts¹. An incumbrancer is bound to apply what he receives by virtue of his security to that security². Money received by a mortgagee on a sale by the mortgagor in which he concurs is received by virtue of the security³. Money received from a third person who is liable to make good a deficiency on the first mortgage is not, however, retained for the benefit of subsequent incumbrancers if ultimately it appears that there is no deficiency, but instead will be repaid to the third person⁴.

1 See *Knight v Bowyer* (1859) 4 De G & J 619.

2 See *Knight v Bowyer* (1859) 4 De G & J 619 at 629.

3 *Johnson v Bourne* (1843) 2 Y & C Ch Cas 268; *Young v English* (1843) 7 Beav 10.

4 *Sawyer v Goodwin* (1875) 1 ChD 351 at 358, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(1) GENERAL ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/709. When settled accounts may be reopened.

709. When settled accounts may be reopened.

A settled account¹ is prima facie binding on the parties to it, but in certain circumstances it will be reopened² and taken again from the beginning, or the less drastic remedy may be allowed of giving leave to surcharge and falsify, that is to take exception to particular omissions or entries³.

1 As to settled accounts see **EQUITY** vol 16(2) (Reissue) PARA 452. As to a settlement of account constituting a payment so as to discharge a right of action for breach of contract see **CONTRACT** vol 9(1) (Reissue) PARA 1043 et seq. As to the effect of an account stated see **CONTRACT** vol 9(1) (Reissue) PARAS 1049-1051.

2 As to reopening a settled account see **EQUITY** vol 16(2) (Reissue) PARA 453.

3 In addition to the equitable remedy, the Civil Procedure Rules also provide for the notification of objections to the accounting party in circumstances where the account is perceived to be inaccurate: see *Practice Direction--Accounts, Inquiries etc* PD 40 para 3; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1526.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(1) GENERAL ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/710. Claim must be distinctly alleged and proved.

710. Claim must be distinctly alleged and proved.

Whether it is desired to reopen the account¹ or only to surcharge and falsify², the ground on which relief is claimed must be distinctly alleged and proved as alleged³. Where there are several accounts, errors in some will render all liable to be reopened or objected to, if the relationship subsisting between the parties, the character of the errors and the connection of the accounts lead to the inference that the errors proved in some cases may be expected to appear in all⁴.

1 As to reopening settled accounts see PARA 709.

2 As to liberty to surcharge and falsify see PARA 709.

3 *Taylor v Haylin* (1788) 2 Bro CC 310; *Drew v Power* (1803) 1 Sch & Lef 182 at 192; *Davies v Spurling* (1829) Tam 199 (cited sub nom *Davis v Starling* (1829) in 1 Coop temp Cott at 551); *Shepherd v Morris* (1841) 4 Beav 252; *Parkinson v Hanbury* (1867) LR 2 HL 1 at 19.

4 *Cheese v Keen* [1908] 1 Ch 245 at 251. See also *Lawless v Mansfield* (1841) 1 Dr & War 557 at 604.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(1) GENERAL ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/711. Setting off and correcting errors.

711. Setting off and correcting errors.

The accounting party cannot avoid liability by setting off against each other errors in different accounts¹. He may escape an order to surcharge and falsify² by correcting particular errors before proceedings are commenced³, but not in the course of the proceedings⁴.

1 *Lawless v Mansfield* (1841) 1 Dr & War 557 at 615. As to set-off generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq. The authorities referred to in this paragraph must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 As to liberty to surcharge and falsify see PARA 709.

3 *Davies v Spurling* (1829) Tam 199 at 214.

4 *Lawless v Mansfield* (1841) 1 Dr & War 557 at 623.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(1) GENERAL ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/712. Persons bound by the account.

712. Persons bound by the account.

An account taken, whether in or out of court, between the mortgagee and the person immediately interested in the equity of redemption¹ is prima facie binding on other persons interested². Thus an account between mortgagee and mortgagor binds a second mortgagee³. An account taken in the presence of a bankrupt will bind him if he afterwards procures a reassignment of the property, even though his trustee was not a party⁴. An account between a mortgagee and the tenant for life of the equity of redemption binds both vested and contingent remaindermen⁵.

1 As to the equity of redemption see PARA 302 et seq.

2 See the cases cited in notes 3-5.

3 *Needler v Deeble* (1677) 1 Cas in Ch 299; *Williams v Day* (1680) 2 Cas in Ch 32; *Knight v Bampfild* (1683) 1 Vern 179; cf *Dick v Butler* (1827) 1 Mol 42. A first mortgagee is under no duty to inform a second mortgagee of the state of account between himself and the mortgagor: *Weld-Blundell v Synott* [1940] 2 KB 107, [1940] 2 All ER 580.

4 *Byrne v Lord Carew* (1849) 13 I Eq R 1.

5 *Allen v Papworth* (1731) 1 Ves Sen 163; *Wrixon v Vize* (1842) 2 Dr & War 192.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(1) GENERAL ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/713. Persons not bound.

713. Persons not bound.

Persons who are not parties to the account are not bound if fraud or collusion and also particular errors are alleged and proved¹. Apart from fraud or collusion, proof of particular errors will entitle the absent party to an order to surcharge and falsify². An account taken between the mortgagee and a transferee of the mortgage does not bind the mortgagor³. An account taken in court at the instance of a claimant is not binding as between co-defendants, unless the claimant cannot obtain the object of the proceedings without determining the rights of the defendants among themselves⁴, but in proceedings by a second mortgagee against the mortgagor and the first mortgagee, if the first mortgagee's debt is established, the mortgagor is bound so long as the judgment remains unimpeached⁵.

1 *Needler v Deeble* (1677) 1 Cas in Ch 299; *Knight v Bampfild* (1683) 1 Vern 179; *Hall v Heward* (1886) 32 ChD 430 at 435, CA. The authorities referred to in this paragraph must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 *Wrixon v Vize* (1842) 2 Dr & War 192 at 205; cf *Badham v Odell* (1742) 4 Bro Parl Cas 349, HL. As to liberty to surcharge and falsify see PARA 709.

3 *Earl of Macclesfield v Fitton* (1683) 1 Vern 168; *Mangles v Dixon* (1852) 3 HL Cas 702 at 737; cf *Jamieson v English* (1820) 2 Mol 337.

4 *Cottingham v Earl of Shrewsbury* (1843) 3 Hare 627 at 638. See also *North West Water v Binnie & Partners* [1990] 3 All ER 547.

5 *Farquharson v Seton* (1828) 5 Russ 45 at 62.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(2) ACCOUNTS BY THE MORTGAGEE IN POSSESSION/714. Continuous account.

(2) ACCOUNTS BY THE MORTGAGEE IN POSSESSION

714. Continuous account.

In the absence of special direction, the account taken against a mortgagee in possession is a continuous debtor and creditor account¹. The mortgagee is debited with all sums which he has received or which he is to be treated as having received² by virtue of the mortgage, whether rents and profits, or accidental payments, such as proceeds of sale³; and he is credited with the principal money, with interest accruing due from time to time⁴, and with costs, charges and expenses⁵, including all expenditure upon the mortgaged property which he is entitled to charge against it⁶. The nature of the account requires that it is to be taken without limit⁷, that is, from the commencement of the possession, or, if there has already been a settled account, from that account⁸.

1 *Wrigley v Gill* [1905] 1 Ch 241 at 253.

2 As to wilful default account see PARA 428.

3 As to the application of the proceeds of sale see PARA 471 et seq.

4 As to accounts of principal and interest see PARA 723 et seq.

5 See *Re Wallis, ex p Lickorish* (1890) 25 QBD 176, CA; and PARA 739 et seq.

6 See *Thompson v Hudson* (1870) LR 10 Eq 497 at 498; *Union Bank of London v Ingram* (1880) 16 ChD 53; *Cockburn v Edwards* (1881) 18 ChD 449 at 456, CA. In *Thompson v Hudson* above, the account was taken in three columns, showing the sums received in one column, the interest due and the costs in a second column and the capital debt in the third. If, however, the whole account is presented as a debtor and creditor account, it is necessarily restricted to two columns. In fact, however, where the mortgagee is in possession, the order to account normally requires that separate single column accounts are to be taken of:

- 13 (1) what is due to the mortgagee for principal, interest and costs;
- 14 (2) money laid out by the mortgagee in necessary repairs and lasting improvements, with, in the case of lasting improvements, interest from the date of outlay; and
- 15 (3) the rents and profits received by the mortgagee or which without wilful default might have been received.

The aggregates of the accounts in heads (1) and (2) are added together, and that of the account in head (3) is subtracted, and the balance is the amount due to the mortgagee.

7 See *Hood v Easton* (1856) 2 Giff 692; and **LIMITATION PERIODS** vol 68 (2008) PARA 1118. Cf *Forster v Forster* [1918] 1 IR 95, where the defendant was held not to have been a mortgagee in possession.

8 As to partnership accounts see *Miller v Miller* (1869) LR 8 Eq 499; *Betjemann v Betjemann* [1895] 2 Ch 474, CA; and **PARTNERSHIP** vol 79 (2008) PARA 150 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(2) ACCOUNTS BY THE MORTGAGEE IN POSSESSION/715. Effect of surplus receipts or deficiency in receipts.

715. Effect of surplus receipts or deficiency in receipts.

If the rents and other receipts from time to time derived from the mortgaged property are more than the interest¹, the mortgagee, where the account is taken continuously, does not apply the excess in reduction of principal, and so at the same time reduce the subsequent interest; he keeps it in hand, paying no interest on it, and thereby gains an incidental advantage². If, on the other hand, the rents and other receipts are less than the interest, the deficiency means an accumulation of interest overdue, and this is a further debt owing by the mortgagor on which he pays no interest³. The rents and receipts are not appropriated to interest separately, but go generally in reduction of principal and interest, and this method favours either mortgagee or mortgagor according to the state of the account⁴.

1 As to accounts of principal and interest see PARA 723 et seq.

2 See *Union Bank of London v Ingram* (1880) 16 ChD 53.

3 See *Union Bank of London v Ingram* (1880) 16 ChD 53.

4 See *Union Bank of London v Ingram* (1880) 16 ChD 53.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(2) ACCOUNTS BY THE MORTGAGEE IN POSSESSION/716. Taking account with rests.

716. Taking account with rests.

So far as the continuous account favours the mortgagor, it is not interfered with¹. If the current excess of interest due over receipts were turned into capital and so made to bear interest, this would be to give compound interest against the mortgagor, which can only be done when the mortgage contract provides for compound interest². So far as the continuous account favours the mortgagee, however, the court interferes in certain circumstances and deprives him of the advantage so gained by directing the account to be taken with rests, that is, when the receipts for the year or other period exceed the interest and current expenses, the surplus is credited in reduction of principal, and interest runs from then onwards only on the reduced amount³.

This may be done either by taking a separate revenue account, and carrying the balance to the credit of principal, or by simply striking a balance in the ordinary account which includes principal⁴, the balance thus showing the reduced principal. Rests, it has been said, are only directed in the case of real estate⁵, but there seems to be no reason for this distinction. They may be directed where the mortgagee is charged with an occupation rent⁶, but the mortgagee must be in possession as such, and not as tenant⁷. Where rests have been directed in a redemption claim⁸ which is abandoned and a foreclosure claim⁹ is subsequently brought, the accounts must be taken with rests, at any rate up to the date of the earlier order¹⁰. Although rests are not directed, it may be necessary to find out from time to time whether the mortgagee has rents in hand sufficient to cover interest; where, for instance, this is required to avoid a claim for capitalisation of interest in arrear¹¹.

1 See PARA 715.

2 As to compound interest see PARA 217; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1304.

3 See PARA 715.

4 See PARA 715.

5 *Robinson v Cumming* (1742) 2 Atk 409 at 410.

6 *Donovan v Fricker* (1821) Jac 165; *Wilson v Metcalfe* (1826) 1 Russ 530. See also PARA 430.

7 *Page v Linwood* (1837) 4 Cl & Fin 399, HL.

8 See PARA 667. As to the equity of redemption see PARA 302 et seq.

9 As to foreclosure generally see PARA 566 et seq.

10 *Morris v Islip* (1855) 20 Beav 654.

11 *Wrigley v Gill* [1906] 1 Ch 165, CA. See also PARA 219.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(2) ACCOUNTS BY THE MORTGAGEE IN POSSESSION/717. Effect of rests after satisfaction of debt.

717. Effect of rests after satisfaction of debt.

After the mortgage debt is satisfied, the effect of the rests is to make interest payable by the mortgagee. For each period in which there is an excess of receipts over expenses, there is a balance owing from the mortgagee to the mortgagor; and these balances carry compound interest¹, that is, the interest due for any period is added to the balance due at the end of the period, and the interest for the ensuing period is reckoned on the aggregate sum. As long as there is principal due, the rests may be made either from time to time, whenever the mortgagee has an excess of receipts over interest and expenses in hand, or at stated intervals². The former method is suitable if there are likely to be substantial sums in hand, and it has been ordered³, but more usually the account is directed to be taken with yearly or half-yearly rests and then only the periodical balance in the mortgagee's hands is struck off the principal⁴. When there is no longer any principal due, the direction for annual rests is equivalent to a direction that the mortgagee is to be charged with compound interest, and operates in the same way as in other cases where an accounting party (for example, an executor) has money in hand⁵; but this may be made more explicit by a direction that, in taking the periodic rests (except the first), the interest of each preceding balance is to be included in the new balance, so as to charge the mortgagee with compound interest⁶. Under special circumstances the order may direct each receipt to carry interest from the time of receipt in addition to periodic rests⁷. If a mortgagee, who has not been in possession, has surplus sale money in hand, he is charged simple interest at the same rate⁸. A mortgagee, although not in possession, will be charged compound interest on money in his hands if he improperly resists redemption⁹.

1 As to compound interest see PARA 217; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1304.

2 As to taking account with rests see PARA 716.

3 *Binnington v Harwood* (1825) Turn & R 477.

4 See the form of decree in *Yates v Hambly* (1742) 2 Atk 360 (cited in *Webber v Hunt* (1815) 1 Madd 13 at 14). See also *Wilson v Cluer* (1840) 3 Beav 136; *Thorneycroft v Crockett* (1848) 2 HL Cas 239 at 256. In *Binnington v Harwood* (1825) Turn & R 477, the decree combined both these methods, but they appear to be incompatible.

5 See *Raphael v Boehm* (1805) 11 Ves 92 (affd (1807) 13 Ves 407; subsequent proceedings as to costs 13 Ves 590); *Heighington v Grant* (1840) 5 My & Cr 258; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 804.

6 See the orders in *Cotham v West* (1839) 1 Beav 380; *Ashworth v Lord* (1887) 36 ChD 545 at 552.

7 See *Raphael v Boehm* (1805) 11 Ves 92; *Lloyd v Jones* (1842) 12 Sim 491. The rate of interest was usually 4% per annum; *Ashworth v Lord* (1887) 36 ChD 545 at 552; *Quarrell v Beckford* (1816) 1 Madd 269 at 285; *Wilson v Metcalfe* (1826) 1 Russ 530 at 537; *Lewes v Morgan* (1829) 3 Y & J 394 at 399; *Montgomery v Calland* (1844) 14 Sim 79 at 82; *Horlock v Smith* (1844) 1 Coll 287 at 297. Presumably a more realistic rate would be allowed today. As to interest generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1303 et seq.

8 *Smith v Pilkington* (1859) 1 De GF & J 120 at 136; *Eley v Read* (1897) 76 LT 39, CA.

9 *Smith v Pilkington* (1859) 1 De GF & J 120. As to the equity of redemption see PARA 302 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(2) ACCOUNTS BY THE MORTGAGEE IN POSSESSION/718. When rests ordered.

718. When rests ordered.

The account is not taken with rests unless a special direction to that effect is inserted in the order¹, and such a direction is not inserted as a matter of course². A mortgagee is not bound to accept payment of his money by driblets³, and the direction is not given unless the mortgagee has impliedly elected to be paid in this manner, or has so acted as to forfeit his usual immunity. He impliedly elects to be paid by driblets if he enters into possession when no interest is in arrear⁴, and there are no special circumstances to account for his taking this step⁵. Hence the account will usually be taken with rests if there was no interest in arrear when the mortgagee entered⁶, but without rests if interest was in arrear⁷. For this purpose, a half-year's arrear of interest is sufficient⁸. Where bills for arrears of interest are current when the mortgagee takes possession and are dishonoured at maturity, the interest is in arrear all the time, and no rests will be directed⁹. Apparently, mere excess of receipts is not sufficient to render the mortgagee liable to rests¹⁰. If special burdens have been imposed upon the mortgagee by the mortgagor's conduct, rests will not be directed even though no interest was in arrear¹¹; and the mortgagee need not account with rests if he enters on leasehold premises to avoid a forfeiture¹².

1 *Webber v Hunt* (1815) 1 Madd 13; *Donovan v Fricker* (1821) Jac 165 at 168.

2 *Davis v May* (1815) 19 Ves 383; *Donovan v Fricker* (1821) Jac 165; *Scholefield v Ingham* (1838) Coop Pr Cas 477. See also *Neesom v Clarkson* (1845) 4 Hare 97 at 105.

3 *Nelson v Booth* (1858) 3 De G & J 119 at 122; *Wrigley v Gill* [1905] 1 Ch 241 at 254 (on appeal [1906] 1 Ch 165 at 175, CA).

4 *Nelson v Booth* (1858) 3 De G & J 119; *Ashworth v Lord* (1887) 36 ChD 545. As to the circumstances entitling the mortgagee to take possession see PARA 402 et seq.

5 *Horlock v Smith* (1844) 1 Coll 287 at 297.

6 *Shephard v Elliot* (1819) 4 Madd 254; *Scholefield v Ingham* (1838) Coop Pr Cas 477; *Wilson v Cluer* (1840) 3 Beav 136.

7 *Stephens v Wellings* (1835) 4 LJCh 281; *Wilson v Cluer* (1840) 3 Beav 136; *Finch v Brown* (1840) 3 Beav 70; *Nelson v Booth* (1858) 3 De G & J 119 at 122; *Scholefield v Lockwood (No 3)* (1863) 32 Beav 439.

8 *Moore v Painter* (1842) 6 Jur 903.

9 *Dobson v Land* (1851) 4 De G & Sm 575.

10 *Baldwin v Lewis* (1835) 4 LJCh 113. See also *Nelson v Booth* (1858) 3 De G & J 119. Formerly it was considered that any considerable excess of receipts over interest was a ground for directing rests (*Gould v Tancred* (1742) 2 Atk 533; *Donovan v Fricker* (1821) Jac 165); and this was treated as correct in *Carter v James* (1881) 29 WR 437, although rests were not directed where the excess was slight (*Gould v Tancred* above; *Donovan v Fricker* above; *Scholefield v Ingham* (1838) Coop Pr Cas 477).

11 *Horlock v Smith* (1844) 1 Coll 287 at 297.

12 *Patch v Wild* (1861) 30 Beav 99.

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719. Effect of mortgagee setting up adverse title.

The mortgagee forfeits an ordinary mortgagee's immunities if he unsuccessfully sets up a title as owner adverse to the mortgagor and denies his right to redeem, and he will be ordered to account with rests even though interest was in arrear when he took possession¹.

1 *Incorporated Society in Dublin v Richards* (1841) 1 Dr & War 258 at 334; *National Bank of Australasia v United Hand-in-Hand and Band of Hope Co* (1879) 4 App Cas 391 at 409, PC; *Wrigley v Gill* [1905] 1 Ch 241 at 254. See also *Montgomery v Calland* (1844) 14 Sim 79; *Douglas v Culverwell* (1862) 4 De GF & J 20.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(2) ACCOUNTS BY THE MORTGAGEE IN POSSESSION/720. Effect of subsequent payment of arrears of interest.

720. Effect of subsequent payment of arrears of interest.

If interest was in arrear when the mortgagee took possession, so that he was not in the first instance liable to account with rests¹, he does not become liable so to account from the date when the arrears were paid off out of the rents². If, however, while the mortgagee is in possession under circumstances which do not subject him to account with rests, an account is settled between the parties which shows that no interest is due, or that arrears of interest have been turned into principal, the mortgagee is from then onwards liable to account with rests³. Moreover, when the mortgage has been satisfied, the mortgagee must from then onwards account with rests, and a direction to that effect may be given subsequently to the original order to account⁴. The direction may be given at any time after the account shows that the mortgage is paid off, although not asked for originally⁵; or the mortgagee may be charged with interest on money received from the times of receipt⁶.

1 See PARA 716.

2 *Davis v May* (1815) 19 Ves 383; *Latter v Dashwood* (1834) 6 Sim 462; *Finch v Brown* (1840) 3 Beav 70; *Wilson v Cluer* (1840) 3 Beav 136 at 140; *Scholefield v Lockwood (No 3)* (1863) 32 Beav 439.

3 *Wilson v Cluer* (1840) 3 Beav 136. As to the arrears of interest recoverable by a mortgagee in possession see PARA 219.

4 *Wilson v Metcalfe* (1826) 1 Russ 530; *Wilson v Cluer* (1840) 3 Beav 136; *Montgomery v Calland* (1844) 14 Sim 79; *Ashworth v Lord* (1887) 36 ChD 545. See also *Quarrell v Beckford* (1816) 1 Madd 269.

5 *Wilson v Metcalfe* (1826) 1 Russ 530.

6 *Lloyd v Jones* (1842) 12 Sim 491.

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721. Application of proceeds of sale of part of property.

Where a sale of part of the property is effected, the net proceeds are applied first in payment of interest then due, and the surplus is carried to the credit of principal as at the date of receipt, so as to reduce the amount on which interest runs from then; but no rest is made at the same time in the account of rents and profits. If the account is being taken without rests, the account of rents and profits will go on continuously as though there had been no special receipt of capital money. If the account is being taken with rests, the usual rest will be made at the next period¹.

¹ *Wrigley v Gill* [1905] 1 Ch 241 at 253-254; *Ainsworth v Wilding* [1905] 1 Ch 435 (explaining *Thompson v Hudson* (1870) LR 10 Eq 497).

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722. When fresh account necessary.

Where the mortgagee receives rents after the account has been taken, he must render a fresh account verified by witness statement or affidavit up to the time when the matter is finally settled¹.

¹ *Oxenham v Ellis* (1854) 18 Beav 593 at 595. This authority must be read in the light of the Civil Procedure Rules: see CPR 40; *Practice Direction--Accounts, Inquiries etc* PD 40; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1524 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/723. Special matters must be pleaded or set out.

(3) ACCOUNTS OF PRINCIPAL AND INTEREST

723. Special matters must be pleaded or set out.

The first account to be taken under a mortgage is the account of principal and interest. If there is any special matter affecting the amount at which the mortgagor or a person claiming under him is entitled to redeem, such as a valuation of the security in bankruptcy¹, this must be pleaded or otherwise brought to the court's attention before the judgment directing the account is given, in which case an appropriate direction can be inserted. If this is not done, the question cannot be subsequently raised on taking the account². If the account of interest is not taken owing to an expected deficiency, and payments are ordered to be made on account of principal, this does not prevent the subsequent calculation of interest in the event of a surplus³.

1 See PARA 597 note 1.

2 *Sanguinetti v Stuckey's Banking Co (No 2)* [1896] 1 Ch 502.

3 *Re Calgary and Medicine Hat Land Co Ltd, Pigeon v Calgary and Medicine Hat Land Co Ltd* [1908] 2 Ch 652 at 658, 662, CA.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/724. Proof of principal debt.

724. Proof of principal debt.

Where a mortgage is given for a specific sum stated to be then advanced, the receipt of which is acknowledged by the mortgagor, the mortgage deed is prima facie evidence of the amount of the advance¹, and, accordingly, the principal debt is proved by production of the deed, with the receipt contained in the deed or indorsed on it². The receipt is not conclusive, however, and the mortgagor is entitled to show by oral evidence that the sum named was not in fact advanced³. The burden of proving the advance strictly is on the mortgagee in certain cases, namely where the mortgagee was at the time the mortgagor's solicitor or agent⁴, or where there is evidence of pressure⁵ or fraud⁶. Where a security is given for a bill of costs, the court will inquire whether the charges were fair and reasonable⁷.

1 As to the effect of the receipt see further PARA 381; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 224; **ESTOPPEL** vol 16(2) (Reissue) PARA 1025.

2 *Piddock v Brown* (1734) 3 P Wms 288; *Goddard v Complin* (1699) 1 Cas in Ch 119; *Holt v Mill* (1692) 2 Vern 279. A transfer of a mortgage, reciting that a certain sum is due on the security, has been held to estop the transferee from subsequently having costs which were included assessed on an ordinary application, although a contemporaneous receipt ended with 'accounts hereafter to be adjusted': see *Re Forsyth* (1865) 11 Jur NS 213 at 615; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 224; **ESTOPPEL** vol 16(2) (Reissue) PARA 1025. Account books of a deceased mortgagee containing entries against his interest are evidence of the state of the accounts: see *Hudson and Humphrey v Owners of Swiftsure* (1900) 82 LT 389. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

3 *Minot v Eaton* (1826) 4 LJOS Ch 134 at 135; *Mainland v Upjohn* (1889) 41 ChD 126 at 136; *Close Asset Finance Ltd v Taylor* [2006] EWCA Civ 788, 150 Sol Jo LB 708, [2006] All ER (D) 304 (May). See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 224; **ESTOPPEL** vol 16(2) (Reissue) PARA 1025.

4 *Lewes v Morgan* (1817) 5 Price 42 at 83; *Lewes v Morgan* (1829) 3 Y & J 230 at 249, Ex Ch (subsequent proceedings (1829) 3 Y & J 394 at 398); *Lawless v Mansfield* (1841) 1 Dr & War 557 at 608; *Gresley v Mousley* (1862) 8 Jur NS 320. As to entries in the mortgagor's solicitor's books of the receipt of the mortgage money being evidence of the advance see *Clark v Wilmot* (1841) 1 Y & C Ch Cas 53; 2 Y & C Ch Cas 259 note (h). As to the relationship of solicitor and client see generally **LEGAL PROFESSIONS** vol 66 (2009) PARA 763 et seq.

5 Eg in a post-obit security: *Tottenham v Green* (1863) 32 LJCh 201.

6 *Piddock v Brown* (1734) 3 P Wms 288.

7 *Wragg v Denham* (1836) 2 Y & C Ex 117 at 121.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/725. Bonus or commission.

725. Bonus or commission.

The mortgagee may stipulate for a commission of an amount reasonable, having regard to the risk run¹. If, on making the advance, he deducts this commission from the sum stated in the mortgage deed, and pays only the balance, the full sum so stated will be allowed as the principal debt in his account². If the commission is not deducted at the time of the advance, it will be allowed subsequently in the accounts under the head of just allowances, provided that it is stipulated for in the mortgage contract, and that the bargain is deliberately entered into while the parties are on equal terms³. An agreement in consideration of a present advance to pay a larger sum in the future is valid⁴.

1 See PARA 321.

2 *Mainland v Upjohn* (1889) 41 ChD 126; *Potter v Edwards* (1857) 26 LJCh 468; *Biggs v Hoddinott*, *Hoddinott v Biggs* [1898] 2 Ch 307 at 322, CA. The doctrine laid down in *Re Edwards' Estate* (1861) 11 I Ch R 367 at 369, that an onerous contract entered into as part of the mortgage transaction is presumed to be made under pressure, is not correct: *Biggs v Hoddinott*, *Hoddinott v Biggs* above.

3 *Bucknell v Vickery* (1891) 64 LT 701, PC; *The Benwell Tower* (1895) 72 LT 664 at 670. So far as to the contrary, *Broad v Selfe* (1863) 11 WR 1036 and *James v Kerr* (1889) 40 ChD 449 at 459 appear now not to be law.

4 *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 702, HL.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/726. Future advances; current account.

726. Future advances; current account.

The security may be given to cover future advances whether in addition to an immediate advance or not, or to cover a current account, or to cover present or future liabilities¹. A security for advances will generally, if the surrounding circumstances favour the construction, include past as well as future advances². A charge on a policy of insurance for notes cashed may cover the balance due at the mortgagor's death³, but a security to cover the mortgagor's liabilities to the mortgagee refers only to direct liabilities and does not include liability on a bill which the mortgagee has purchased⁴. A mortgage to a bank to cover debts due or growing due from the mortgagor covers his liability on bills drawn by him and accepted by a third person which are then under discount with the bank and subsequently dishonoured⁵; and a mortgage of a public house to brewers to cover the debts due from the mortgagor or his assigns will cover the business debt of his devisee⁶. There may be a further advance even though no money is paid directly to the mortgagor⁷. Sometimes an express limit on the amount recoverable under the security is inserted, and, according to the construction of the deed, this may be a limit on principal only, leaving interest and outgoings to be recovered in addition⁸, or it may be a limit on the aggregate sum recoverable for principal, interest and costs⁹.

1 As to the right of a solicitor mortgagee to add certain costs to his security see PARA 322. As to further advances by an executor-mortgagee see *Gannon v Gannon* [1909] 1 IR 47, CA.

2 *Hibernian Bank v Gilbert* (1890) 23 LR Ir 321.

3 *Jones v Consolidated Investment Assurance Co* (1858) 26 Beav 256.

4 *Calisher v Forbes* (1871) 7 Ch App 109 at 114.

- 5 *Merchants Bank of London v Maud* (1871) 19 WR 657.
- 6 *Re Watts, Smith v Watts* (1882) 22 ChD 5, CA.
- 7 *Re Smith, Lawrence v Kitson* [1918] 2 Ch 405.
- 8 See *White v City of London Brewery Co* (1889) 42 ChD 237, CA.
- 9 *Blackford v Davis* (1869) 4 Ch App 304 at 309 (proviso 'that the total moneys to be secured by and ultimately recoverable under these presents shall not exceed the sum of £1,200').

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/727. Proof as to amount secured.

727. Proof as to amount secured.

By agreement between the parties, a mortgage for a specific sum may be in fact a mortgage to secure a current account up to the limit of that sum, but the burden of proof is on the party who seeks to establish that it is a running security¹. The actual amount due on a mortgage to secure a current account, or a mortgage covering further advances, may be proved by evidence outside the deed or by receipts on the deed².

- 1 *Re Boys, Eedes v Boys, ex p Hop Planters Co* (1870) LR 10 Eq 467. See also *Henniker v Wigg* (1843) 4 QB 792; *Melland v Gray* (1843) 2 Y & C Ch Cas 199.
- 2 See *Melland v Gray* (1843) 2 Y & C Ch Cas 199.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/728. Appropriation of payments in current account.

728. Appropriation of payments in current account.

Prima facie, in the case of a mortgage to secure a current account, unless there has been express appropriation by either party¹, sums paid by the mortgagor are applied in satisfaction of the items on the debit side in order, beginning with the earliest in date². Inasmuch, however, as the security does not, for purposes of priority as against a second mortgage, include advances made after notice of the second mortgage³ unless the security imposes an obligation to make those advances, the result is that the mortgage becomes a mortgage for the fixed amount of the balance then outstanding, and subsequent payments will go to satisfy it, while subsequent advances will, as against the second mortgagee, be unsecured⁴.

- 1 *The Mecca* [1897] AC 286, HL; and see *Williams v Rawlinson* (1825) 3 Bing 71.
- 2 *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572; and see *Bodenham v Purchas* (1818) 2 B & Ald 39. This rule is usually referred to as 'the rule in *Clayton's Case*'. See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 865, 873; **CONTRACT** vol 9(1) (Reissue) PARAS 956-960.
- 3 *Hopkinson v Rolt* (1861) 9 HL Cas 514. See also *Gordon v Graham* (1716) 7 Vin Abr 52 pl 3; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 972.

⁴ See *London and County Banking Co v Ratcliffe* (1881) 6 App Cas 722, HL; *Deeley v Lloyds Bank Ltd* [1912] AC 756 at 774, HL, per Lord Atkinson; *Re Chute's Estate* [1914] 1 IR 180.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/729. Interest by contract.

729. Interest by contract.

Apart from express stipulation¹, a mortgage security implies an agreement to pay interest². The first mortgagee is not accountable to a second mortgagee for extra interest stipulated for and received after notice of the second mortgage³.

¹ As to express stipulations for payment of interest see PARAS 215-217. As to a proviso for reduction of interest on punctual payment see PARA 218. As to set-off of interest where the mortgagor takes a legacy from the mortgagee see *Pettat v Ellis* (1804) 9 Ves 563. As to set-off generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq. In mortgage transactions, 'month' formerly meant 'calendar month' (*Hutton v Brown* (1881) 45 LT 343 per Fry J; *Schiller v Petersen & Co Ltd* [1924] 1 Ch 394, CA); and this is its meaning in all documents made or coming into operation after 1925, unless the context otherwise requires (see the Law of Property Act 1925 s 61(a); CPR 2.10; and **CIVIL PROCEDURE** vol 11 (2009) PARA 90; **TIME** vol 97 (2010) PARA 307 et seq).

² See PARAS 208, 215.

³ *Law v Glenn* (1867) 2 Ch App 634 at 639.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/730. Interest as damages for delay.

730. Interest as damages for delay.

Where the mortgage provides for interest up to the day fixed for payment but not beyond, a contract for the continuance of the same rate of interest until payment is not implied, but subsequent interest will be given by way of damages for breach of contract, and the current rate of interest on damages will generally be adopted as a proper measure of damages for the subsequent delay¹. This rule applies both to proceedings on the covenant, and to accounts taken in redemption or foreclosure². In taking those accounts, interest may not be ascertained as damages but will be awarded on the same footing as consideration for allowing the loan to remain unpaid³.

¹ See PARA 220.

² As to proceedings for redemption see PARA 656 et seq. As to foreclosure generally see PARA 566 et seq.

³ *Wallington v Cook* (1878) 47 LJCh 508 (where, in a 60% loan, interest at 5% was allowed subsequent to the day for payment). Dicta in *Re Roberts*, *Goodchap v Roberts* (1880) 14 ChD 49 at 52, CA, *Mellersh v Brown* (1890) 45 ChD 225 at 230 and, perhaps, *Economic Life Assurance Society v Usborne* [1902] AC 147 at 154, HL, per Lord Davey, suggest that full interest at the original rate will be allowed, but the procedure in *Wallington v Cook* above seems correct.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/731. Interest on covenant merges in judgment.

731. Interest on covenant merges in judgment.

Where the mortgage deed provides for payment of interest on the principal debt after default and judgment for the principal debt is obtained, the mortgage debt is merged in the judgment, and, if the covenant to pay interest was merely incidental to the covenant to pay the principal debt, the interest will no longer be recoverable under the covenant to pay interest, but interest at the statutory rate¹ is recoverable on the judgment². Similarly, where the mortgage does not provide for interest after default, only the statutory rate is recoverable after judgment³. If the covenant is to pay interest on principal remaining unpaid, it ceases to be operative on the judgment being obtained, as the principal due under the covenant is merged in the judgment debt, and is no longer, so it has been said, unpaid⁴. If the covenant is to pay interest on the principal money remaining due on the security of the mortgage, the effect is different, and the covenant remains operative notwithstanding the judgment⁵. The covenant likewise remains operative despite the judgement if it expressly binds the mortgagor to pay interest at the agreed rate on the principal sum or any judgment recovered for it⁶.

1 As to the interest on judgment debts see **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

2 *Re Sneyd, ex p Fewings* (1883) 25 ChD 338 at 355, CA; *Arbuthnot v Bunsilall* (1890) 62 LT 234; *Economic Life Assurance Society v Osborne* [1902] AC 147 at 149, HL. As to money and interest on money see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1276 et seq.

3 *Re European Central Rly Co, ex p Oriental Financial Corp'n* (1876) 4 ChD 33, CA. See also **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

4 *Re Sneyd, ex p Fewings* (1883) 25 ChD 338 at 353, CA.

5 *Popple v Sylvester* (1882) 22 ChD 98, where the action was to obtain personal payment, and not, as suggested in *Re Sneyd, ex p Fewings* (1883) 25 ChD 338 at 345, CA, to realise the security. See also *Economic Life Assurance Society v Osborne* [1902] AC 147 at 152, HL; *Ealing London Borough Council v El Isaac* [1980] 2 All ER 548, [1980] 1 WLR 932, CA. As to the rate of interest on costs ordered to be added to the security see PARA 742.

6 See *Re Sneyd, ex p Fewings* (1883) 25 ChD 338 at 355, CA. After judgment a new agreement may be made continuing the old rate of interest: *Re Agriculturist Cattle Insurance Co, ex p Hughes* (1872) 4 ChD 34n.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/732. Rate of interest recoverable in foreclosure or redemption.

732. Rate of interest recoverable in foreclosure or redemption.

The rule as to merger of interest in the judgment¹ applies only to claims for interest made against the mortgagor personally under his covenants for payment of principal and interest². The amount for the time being recoverable under those covenants is independent of the amount for which the mortgaged property is a security³. The security stands for the amount of the principal and the full interest, that is interest at the agreed rate, and, in taking the accounts in redemption or foreclosure⁴, or for purposes incident to the realisation of the security, it is immaterial that personal judgment has been obtained⁵. Similarly, where the debt is secured by bond, the full interest can be recovered against the mortgaged property, even though the principal and interest recoverable on the bond is limited to the amount of the penalty⁶.

- 1 See PARA 731; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.
- 2 *Economic Life Assurance Society v Usborne* [1902] AC 147, HL.
- 3 *Economic Life Assurance Society v Usborne* [1902] AC 147, HL.
- 4 As to proceedings for redemption see PARA 656 et seq. As to foreclosure see PARA 566 et seq.
- 5 *Economic Life Assurance Society v Usborne* [1902] AC 147, HL. See also *Lowry v Williams* [1895] 1 IR 274, CA.
- 6 *Clarke v Lord Abingdon* (1810) 17 Ves 106. As to bonds see PARA 154.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/733. Commission or fines on default of repayment by instalments.

733. Commission or fines on default of repayment by instalments.

A loan secured by mortgage may be made payable by instalments of a specified amount covering both principal and interest¹. This is usually done in the case of building society mortgages², and may be done in bills of sale³. Additional sums, whether under the name of commission⁴ or fines⁵, and prospective, but not retrospective, default interest rate increases⁶ may be agreed to be paid in the event of instalments being in arrear, and these will be allowed against the mortgagor in the accounts. As a second mortgagee is not in any better position than the mortgagor, commission will also be allowed against him⁷. Interest on fines may not, however, be charged⁸ unless (for instance, on the construction of the building society rules) the fines are to be added to principal⁹; nor may fines for non-payment of fines be charged (unless the rules so provide)¹⁰.

- 1 As to payment by instalments see PARA 211. As to the exercise of the mortgagee's statutory powers of sale in such a case see PARA 453.
- 2 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2015-2018.
- 3 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1732 et seq.
- 4 *General Credit and Discount Co v Glegg* (1883) 22 ChD 549; *The Benwell Tower* (1895) 72 LT 664.
- 5 *Parker v Butcher* (1867) LR 3 Eq 762.
- 6 *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156. As to interest rate increases as penalties see PARA 218.
- 7 *The Benwell Tower* (1895) 72 LT 664 at 669.
- 8 *Parker v Butcher* (1867) LR 3 Eq 762; *Ingoldby v Riley* (1873) 28 LT 55.
- 9 *Provident Permanent Building Society v Greenhill* (1878) 9 ChD 122.
- 10 *Re Middlesbrough Building Society* (1884) 54 LJCh 592. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1902.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/734. Interest ceasing to run after tender.

734. Interest ceasing to run after tender.

A tender of the amount due on the mortgage at a time when the mortgagee is bound to receive it stops interest from running if the mortgagor keeps the money ready to pay over to the mortgagee¹. For this purpose, there must be an actual tender². Even if there has been a tender by a borrower of the amount due for principal and interest, that tender does not stop interest running after the date of the tender unless there is evidence that the sum has been set aside and is ready for payment at any time³. The mortgagor should pay the money into court if there are any proceedings pending in which this can be done; if he makes profit, as by placing the money on deposit, he must account for this to the mortgagee⁴. A mortgagee is not entitled to interest if by his own default he delays payment off⁵, but unavoidable delay in revesting the property in the mortgagor is not such a default⁶.

If the mortgagee fails to attend on the day fixed for payment in a redemption suit, a new day is appointed and subsequent interest is not allowed⁷.

1 *Gyles v Hall* (1726) 2 P Wms 378; *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 284, PC; *Rourke v Robinson* [1911] 1 Ch 480; *Lutton v Rodd* (1675) 2 Cas in Ch 206; *Cliff v Wadsworth* (1843) 2 Y & C Ch Cas 598. As to the necessity to tender the amount due see PARA 332. As to the payment of six months' interest in lieu of notice, and the cases where this is excused, see PARAS 330-331; and as to interest being stopped on loss of title deeds see PARA 496.

2 *Bishop v Church* (1751) 2 Ves Sen 371 at 372; *Garforth v Bradley* (1755) 2 Ves Sen 675 at 678; *Kinnaird v Trollope* (1889) 42 ChD 610; *Graham v Seal* (1918) 88 LJCh 31, CA. See also *Webb v Crosse* [1912] 1 Ch 323; and PARA 332.

3 *Barratt v Gough-Thomas* [1951] 2 All ER 48 at 49, [1951] WN 309 at 309 per Danckwerts J.

4 *Edmondson v Copland* [1911] 2 Ch 301 at 310. Cf *Robarts v Jefferys* (1830) 8 LJOS Ch 137.

5 See *Thornton v Court* (1854) 3 De GM & G 293 at 301.

6 *Webb v Crosse* [1912] 1 Ch 323.

7 *Hughes v Williams* (1853) Kay, App iv. See also PARA 666. As to the equity of redemption see PARA 302 et seq; and as to proceedings for redemption see PARA 656 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/735. Time limit.

735. Time limit.

The statutory limitation on proceedings for the recovery of arrears of interest by a mortgagee¹, and the exclusion from this limitation of foreclosure claims in respect of land² and claims in which the mortgagor is seeking to redeem³, are dealt with elsewhere in this work.

1 See **LIMITATION PERIODS** vol 68 (2008) PARA 1111 et seq.

2 See **LIMITATION PERIODS** vol 68 (2008) PARA 1128. As to foreclosure generally see PARA 566 et seq.

3 See **LIMITATION PERIODS** vol 68 (2008) PARA 1137. As to proceedings for redemption see PARA 656 et seq.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/736. Interest on mortgage of settled property.

736. Interest on mortgage of settled property.

Where the mortgaged property is in settlement subject to the mortgage, it is the duty of the tenant for life to keep down the interest¹, but this is a duty only as between himself and the remainderman. If he makes good a deficiency out of his own money, he has no charge for the amount on the inheritance, unless in some way he has intimated his intention to charge it². Subsequent rents during the life of a tenant for life are applicable to liquidate arrears during the same life tenancy, but he is not liable to make good arrears of a previous life tenancy³. Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates⁴. The mortgagee is not affected, and, unless he has allowed interest to remain unpaid by collusion with the remainderman or other misconduct, he can recover against the inheritance arrears which have accumulated during the life tenancy⁵. The principle applies equally whether the mortgage is made before or after the estate is settled. The mortgagor cannot by putting the equity of redemption in settlement affect the mortgagee's rights, and mere laches⁶ on the mortgagee's part does not prejudice his claim against the remainderman⁷. The remainderman has his remedy by proceedings to compel the tenant for life to keep down the interest⁸. Similarly, all arrears of interest are chargeable by the first mortgagee as against a second mortgagee⁹, unless the first mortgagee has been in possession and has allowed the mortgagor to have the rents without paying interest¹⁰.

1 *Revel v Watkinson* (1748) 1 Ves Sen 93; *Burges v Mawbey* (1823) Turn & R 167 at 174; *Marshall v Crowther* (1874) 2 ChD 199. See also **SETTLEMENTS** vol 42 (Reissue) PARA 961 et seq.

2 *Lord Kensington v Bouverie* (1859) 7 HL Cas 557.

3 *Caulfield v Maguire* (1845) 2 Jo & Lat 141 at 160; *Honywood v Honywood* [1902] 1 Ch 347.

4 *Frewen v Law Life Assurance Society* [1896] 2 Ch 511; *Honywood v Honywood* [1902] 1 Ch 347.

5 *Aston v Aston* (1750) 1 Ves Sen 264; *Loftus v Swift and Governors of St Patrick's Hospital* (1806) 2 Sch & Lef 642 at 654; *Roe v Pogson* (1816) 2 Madd 457; *Wrixon v Vize* (1842) 2 Dr & War 192 at 202; *Re Morley*, *Morley v Saunders* (1869) LR 8 Eq 594.

6 As to laches see **EQUITY** vol 16(2) (Reissue) PARA 910 et seq.

7 *Wrixon v Vize* (1842) 2 Dr & War 192; *Hill v Browne* (1844) Drury temp Sug 426 at 435.

8 *Lord Kensington v Bouverie* (1859) 7 HL Cas 557 at 596; *Makings v Makings* (1860) 1 De GF & J 355 at 358; but see *Scholefield v Lockwood (No 2)* (1863) 4 De GJ & Sm 22 at 31, where it was said that no right arises to the remainderman until the death of the tenant for life.

9 *Aston v Aston* (1749) 1 Ves Sen 264.

10 *Bentham v Haincourt* (1691) Prec Ch 30; *Loftus v Swift and Governors of St Patrick's Hospital* (1806) 2 Sch & Lef 642 at 655.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/737. Overpayments and underpayments.

737. Overpayments and underpayments.

Where interest has been paid on a sum greater than that ultimately held to be charged on the property, the overpayment is not treated as paid in reduction of principal¹. In appropriate circumstances an overpayment of interest may be refunded to the mortgagor², or an underpayment made good to the mortgagee³.

1 *Blandy v Kimber (No 2)* (1858) 25 Beav 537.

2 *Tyler v Manson, Manson v Tyler* (1826) 5 LJOS Ch 34 at 38 per Leach V-C. See *Re Jones's Estate* [1914] 1 IR 188, where payments of interest in full had been made in ignorance of a provision for reduction for punctual payment, and the mortgagor was allowed credit for the amounts overpaid within six years.

3 *Gregory v Pilkington* (1856) 8 De GM & G 616; *Universities Superannuation Scheme Ltd v Marks & Spencer plc* [1999] 1 EGLR 13, [1999] 04 EG 158, CA (underpayment of service charges due from tenant to landlord).

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/12. ACCOUNTS BETWEEN THE MORTGAGOR AND MORTGAGEE/(3) ACCOUNTS OF PRINCIPAL AND INTEREST/738. Capitalisation of interest on transfer, or on redemption by later mortgagee.

738. Capitalisation of interest on transfer, or on redemption by later mortgagee.

Where at the time of the transfer of a mortgage there are arrears of interest due which the transferee pays to the transferor, he can add these to the principal so that from that time they will carry interest, if the transfer is made with the mortgagor's concurrence, but not otherwise¹. In a foreclosure claim² where successive periods of redemption³ are directed, interest is in effect capitalised⁴. Where, in a claim by a first mortgagee against subsequent incumbrancers and the mortgagor, successive redemptions are directed⁵, and the second mortgagee redeems the first but the third mortgagee fails to redeem the second and is foreclosed, it seems that the aggregate amount which the third mortgagee would have had to pay for principal, interest and costs carries interest against the mortgagor⁶.

1 *Ashenhurst v James* (1745) 3 Atk 270; *Agnew v King* [1902] 1 IR 471. See also *Gladwyn v Hitchman* (1690) 2 Vern 135; *Earl of Macclesfield v Fitton* (1683) 1 Vern 168.

2 As to foreclosure see PARA 566 et seq.

3 As to the equity of redemption see PARA 302 et seq; and as to proceedings for redemption see PARA 656 et seq.

4 See PARA 598.

5 Only one time for redemption will now be allowed to the later incumbrancers: see PARAS 601, 659.

6 *Elton v Curteis* (1881) 19 ChD 49.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/13. COSTS, CHARGES AND EXPENSES/(1) IN GENERAL/739. Mortgagee's general right to reimbursement of costs from the security.

13. COSTS, CHARGES AND EXPENSES

(1) IN GENERAL

739. Mortgagee's general right to reimbursement of costs from the security.

A mortgagee is allowed to reimburse himself out of the mortgaged property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving his security¹, including the costs of litigation properly undertaken by him². The right extends to equitable mortgagees and chargees³. There is, however, no implied contract by the mortgagor to pay any such costs, charges and expenses, and they are not, in the absence of express agreement, recoverable against him personally⁴.

1 See *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA.

2 See PARAS 766-767.

3 *Ezekiel v Orakpo* [1997] 1 WLR 340, CA; *Connell v Hardie* (1839) 3 Y & C Ex 582; *R v Chambers* (1840) 4 Y & C Ex 54.

4 *Re Sneyd, ex p Fewings* (1883) 25 ChD 338 at 352, CA, per Cotton LJ; *Sinfield v Sweet* [1967] 3 All ER 479, [1967] 1 WLR 1489.

Halsbury's Laws of England/MORTGAGE (VOLUME 77 (2010) 5TH EDITION)/13. COSTS, CHARGES AND EXPENSES/(1) IN GENERAL/740. Contractual provisions as to costs.

740. Contractual provisions as to costs.

The mortgage deed may contain express provisions varying or extending the mortgagee's general right to reimbursement from the security of costs properly incurred¹. There may, for example, be agreement that the mortgagor is personally liable for payment of costs²; or that costs should be payable on the indemnity basis³; or that the mortgagee is entitled to the costs of proceedings where a third party impugns the title to the mortgage, or the enforcement or exercise of some right or power accruing to the mortgagee⁴. However, express contractual provisions are not normally construed so as to require the mortgagor to pay all costs, charges and expenses even if improperly or unreasonably incurred or improper or unreasonable in amount, and the enforceability of a provision which did so provide would be open to serious questions on public policy grounds⁵.

1 As to the mortgagee's general right to reimbursement of costs from the security see *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and PARA 739.

2 See eg *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA.

3 *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA, where a contractual provision for costs on a full indemnity basis in favour of the mortgagee was construed to require taxation on that basis. The effect of a provision for payment of 'full costs' or 'all costs' is the subject of conflicting decisions. In *Re Adelphi Hotel (Brighton) Ltd, District Bank Ltd v Adelphi Hotel (Brighton) Ltd* [1953] 2 All ER 498 at 501, [1953] 1 WLR 955 at 958-959 per Vaisey J, it was held that such an expression did not require taxation on the solicitor and own client basis. This decision was not cited in *Bank of Baroda v Panessar* [1987] Ch 335, [1986] 3 All ER 751, where it was held that the expression required taxation on the indemnity basis. The decision in *Re Adelphi Hotel (Brighton) Ltd, District Bank Ltd v Adelphi Hotel (Brighton) Ltd* was doubted in *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1992] BCLC 851 at 856-860 per Vinelott J (although no view on the issue was expressed in the subsequent Court of Appeal hearing: see [1993] Ch 171, [1992] 4 All ER 588).

Under the Civil Procedure Rules, taxation is now referred to as 'detailed assessment of costs': see CPR Pt 47; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1779 et seq.

4 Such costs are not normally allowable (see *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA) but express contractual provisions may alter what would otherwise have been the position (see *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171 at 185, [1992] 4 All ER 588 at 600, CA, per Scott LJ).

5 *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171 at 187-188, [1992] 4 All ER 588 at 601-602, CA, per Scott LJ. See also the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; PARAS 229-230; and **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq. See further PARA 741.

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741. Assessment of costs.

The mortgagee does not need to apply for an order for those costs that he has a contractual right to recover out of the mortgage funds, and nor do those costs have to be assessed¹. The mortgagor may make an application for the court to direct that an account of the mortgagee's costs be taken, and may then dispute an amount in the mortgagee's account on the basis that it has been unreasonably incurred or is unreasonable in amount². Where a mortgagor disputes an amount, the court may make an order that the disputed costs be assessed³; and where the court assesses costs payable under the terms of the mortgage, the costs payable are, unless the contract expressly provides otherwise, to be presumed to be costs which have been reasonably incurred, and are reasonable in amount, and the court will assess them accordingly⁴. The court may make an order that all or part of the costs payable under the contract be disallowed if it is satisfied by the paying party that costs have been unreasonably incurred or are unreasonable in amount⁵.

A mortgagor is also entitled to apply for an assessment of a bill of costs rendered to the mortgagee by his solicitor if the mortgagor is liable to pay it⁶.

1 See *Practice Direction about Costs* PD 43-48 para 50.2(1), (2); and PARA 755. As to the assessment of costs payable pursuant to a contract see **CIVIL PROCEDURE** vol 12 (2009) PARA 1806.

2 See *Practice Direction about Costs* PD 43-48 para 50.4(2); and PARA 755.

3 *Practice Direction about Costs* PD 43-48 para 50.4(3).

4 See CPR 48.3(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1806. CPR 48.3 gives effect to the principles cited at PARA 740.

5 *Practice Direction about Costs* PD 43-48 para 50.1.

6 See the Solicitors Act 1974 ss 70, 71(1); and **LEGAL PROFESSIONS** vol 66 (2009) PARA 969 et seq. See further *Re Griffith, Jones & Co* (1883) 50 LT 434, CA; *Re Longbotham & Sons* [1904] 2 Ch 152, CA; *Re Paice and Cross* (1914) 58 Sol Jo 593. If such an application is made after 12 months from the delivery of the bill, or after judgment for recovery of the costs has been obtained or after it is paid, no order can be made except in special circumstances (see the Solicitors Act 1974 s 70(3); and **LEGAL PROFESSIONS** vol 66 (2009) PARA 974 et seq), including those which affect the mortgagor but not the mortgagee (see s 71(2); and **LEGAL PROFESSIONS** vol 66 (2009) PARA 973). Such an assessment is on the indemnity basis: see CPR 48.8; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1812.

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742. Interest on costs and expenses.

Interest at the rate reserved by the mortgage¹ is usually allowed on outlays of a permanent nature, such as renewal fines² or expenses of lasting improvements³, and expenses which there is no income to meet, such as premiums of life policies⁴, but not on the expense of ordinary repairs where the mortgagee is in receipt of the rents and profits⁵ except, perhaps, where the expense exceeds the balance of rents after payment of interest⁶.

The mortgagee is not entitled to interest on costs of proceedings, unless an order is made by which the costs are to be added to his security⁷. If such an order is made they will carry interest from the date of the order at the statutory rate⁸, notwithstanding that a higher rate is reserved by the mortgage⁹. Interest is recoverable¹⁰ only on costs ordered to be paid by one party to the other, not on costs payable out of an estate¹¹, unless the mortgage deed otherwise provides.

1 *Woolley v Drag* (1795) 2 Anst 551; *Townley v Moore* (1856) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1885; *Glencross v Pulman* (1859) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1887.

2 *Manlove v Bale and Bruton* (1688) 2 Vern 84; *Lacon v Mertins* (1743) 3 Atk 1 at 4. As to the conversion of renewal fines on perpetually renewable leases see the Law of Property Act 1922 s 145, Sch 15 paras 5(1), 6, 7(1), 12; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 541.

3 *Webb v Rorke* (1806) 2 Sch & Lef 661 at 676; *Quarrell v Beckford* (1807) 14 Ves 177 at 179. See also *Procter v Cooper* (1700) Prec Ch 116; *Townley v Moore* (1856) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1885; *Glencross v Pulman* (1859) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1887.

4 *Hodgson v Hodgson* (1837) 2 Keen 704; *Marshall v Nunn* (1853) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1885; *Bates v Johnson* (1859) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1885.

5 In the cases cited in note 1, interest on expenses of repairs was not allowed, but sometimes it has been allowed: see *Eyre v Hughes* (1876) 2 ChD 148 at 164; *King v Kitchener* (1871) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1886, CA. See also Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1906.

6 See 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1906. See also *Wrigley v Gill* [1906] 1 Ch 165 at 169, CA, where the dictum that the allowance of interest on necessary repairs and lasting improvements was very unusual seems erroneous so far as it refers to lasting improvements.

7 *Eardley v Knight* (1889) 41 ChD 537.

8 See PARA 731; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

9 *Eardley v Knight* (1889) 41 ChD 537. See also *Lippard v Ricketts* (1872) LR 14 Eq 291.

10 As to the interest on judgment debts see **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

11 *A-G v Nethercote* (1841) 11 Sim 529.

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(2) TYPES OF COSTS AND EXPENSES WHICH MAY BE ADDED TO SECURITY

743. Costs of negotiating the loan and preparing the mortgage.

The mortgagee's costs, charges and expenses which he may add to his security do not, in the absence of special stipulation, include the costs of negotiating the loan and preparing the mortgage as, for these, the mortgagor is personally liable¹. Where the mortgage is to cover every sum advanced or paid by the mortgagee to the mortgagor, or to become owing to the mortgagee by the mortgagor, this does not cover costs².

Where, however, in proceedings, the court ordered that money should be raised by mortgage, a direction was given that the mortgagee should be allowed his costs, including the costs of settling the security³.

1 *Wales v Carr* [1902] 1 Ch 860. See also *Gregg v Slater* (1856) 22 Beav 314; *Field v Hopkins* (1890) 44 ChD 524, CA. The costs of negotiating the loan and preparing the mortgage are normally deducted from the initial advance.

2 *Field v Hopkins* (1890) 44 ChD 524, CA. As to costs of reconveyance see PARA 654.

3 *Nicholson v Jeyes* (1853) 22 LJCh 833.

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744. Costs of completing the security.

The costs of completing the security, such as the costs of obtaining a legal mortgage in pursuance of an agreement accompanying a mortgage by deposit of deeds, may be added to the security, but not the costs of investigating the mortgagor's title for the purpose of the legal mortgage¹. Where the security is on a fund in court and the mortgagee is empowered by the mortgage to apply for a stop order², the costs of the application are allowed³.

1 See *National Provincial Bank of England v Games* (1886) 31 ChD 582, CA, where the items allowed included costs of correspondence as to the legal mortgage. Similarly, the costs of a surrender of copyholds were allowed: see *Pryce v Bury* (1853) 2 Drew 41 (affd (1854) 22 LTOS 324); *Lane v King* (1799) 3 Seton's Form of Decrees, Judgments and Orders (7th Edn, 1912) 1886. However, the costs of an order appointing trustees under the Settled Land Act 1882 (largely repealed: see now the Settled Land Act 1925) for the purpose of leasing the property were not allowed: see *Field v Hopkins* (1890) 44 ChD 524, CA.

2 As to stop orders see PARA 272; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1488-1491.

3 *Waddilove v Taylor* (1848) 6 Hare 307. See also *Hoole v Roberts* (1848) 12 Jur 108, where the costs of a needless application were disallowed.

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745. Expenses of maintenance and repair.

Expenses of maintenance and improvement of the mortgaged property incurred by the mortgagee¹, such as caretaker's wages², expenses of necessary repairs³, and of permanent improvements properly undertaken⁴, and payments to agricultural tenants⁵, are allowed to be

added to his security. Expenses of repairs are allowed as just allowances without express mention in the order for redemption⁶, but repairs done without the mortgagee's written authority by a receiver⁷ appointed by him under his statutory power⁸ cannot be included in his account⁹. To obtain expenses of permanent improvements the mortgagee must allege and prove some expenditure of this nature, and then an inquiry as to money properly¹⁰ laid out in lasting improvements will be directed¹¹. To obtain an inquiry it is sufficient to give general proof of expenditure, and prima facie proof that it has been laid out in lasting improvements; if the proof establishes that the works are improvements proper to be allowed, an account of money so laid out will be directed¹². A similar direction may be given where an adverse possessor has to yield up possession¹³. Where the mortgagor is seeking not redemption but an account of proceeds of sale, the mortgagee's right to an inquiry as to improvements is stronger, as he is of course entitled to the expenses to the extent that they have increased the selling value of the property¹⁴. The mortgagee is also allowed extraordinary expenses incurred for the protection of the property, but the mortgagor should be informed of the outlay as soon as possible¹⁵. A second mortgagee in possession is not entitled as against the first mortgagee to a charge for money expended in preserving or permanently improving the property¹⁶.

1 *White v City of London Brewery Co* (1889) 42 ChD 237 at 243, CA.

2 *Brandon v Brandon* (1862) 10 WR 287.

3 *Godfrey v Watson* (1747) 3 Atk 517; *Sandon v Hooper* (1843) 6 Beav 246. See also **LIEN** vol 68 (2008) PARA 877.

4 *Shepard v Jones* (1882) 21 ChD 469 at 476, CA. See also *Spurgeon v Collier* (1758) 1 Eden 55 at 63; *Davey v Durrant*, *Smith v Durrant* (1857) 1 De G & J 535 at 554; and PARAS 435, 667.

5 See *Oxenham v Ellis* (1854) 18 Beav 593, where payments for which the mortgagee was liable to an outgoing tenant were allowed after certificate and payment of the amount due. In *Barron v Lancefield* (1853) 17 Beav 208, however, further expenses were not allowed after certificate. As to the mortgagee's liability to tenants see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 34.

6 See *Tipton Green Colliery Co v Tipton Moat Colliery Co* (1877) 7 ChD 192; and PARA 667. As to redemption orders see PARA 666 et seq.

7 As to the appointment of receivers out of court see PARAS 475-484.

8 As to the statutory power to appoint a receiver see PARA 476.

9 *White v Metcalf* [1903] 2 Ch 567.

10 *Houghton v Sevenoaks Estate Co* (1884) 33 WR 341.

11 *Tipton Green Colliery Co v Tipton Moat Colliery Co* (1877) 7 ChD 192; 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1885. See also *Webb v Rorke* (1806) 2 Sch & Lef 661 at 676; *Quarrell v Beckford* (1807) 14 Ves 177 at 179; *Scholefield v Lockwood (No 2)* (1863) 11 WR 555. As to objecting to the allowance see *Powell v Trotter* (1861) 1 Drew & Sm 388.

12 *Shepard v Jones* (1882) 21 ChD 469, CA.

13 See *Pelly v Bascombe* (1863) 4 Giff 390.

14 *Shepard v Jones* (1882) 21 ChD 469 at 478, CA; *Henderson v Astwood*, *Astwood v Cobbold*, *Cobbold v Astwood* [1894] AC 150 at 163, PC.

15 *Lord Trimleston v Hamill* (1810) 1 Ball & B 377 at 385.

16 See *Landowners West of England and South Wales Land Drainage and Inclosure Co v Ashford* (1880) 16 ChD 411 at 433; and PARA 196.

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746. Expenditure incurred in making profits.

Where a mortgagee has to account for profits, he is allowed all expenditure necessary for obtaining them¹. If by the terms of the mortgage deed this expenditure is authorised and the mortgagor has covenanted to pay it, it may, in case of deficiency, be charged against the property² or allowed out of the proceeds of sale³.

¹ *Bompas v King* (1886) 33 ChD 279 at 288, CA; *White v City of London Brewery Co* (1889) 42 ChD 237 at 243, CA.

² *Norton v Cooper* (1854) 5 De GM & G 728.

³ *Bompas v King* (1886) 33 ChD 279 at 288, CA; *White v City of London Brewery Co* (1889) 42 ChD 237 at 243, CA.

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747. Insurance premiums and other salvage payments.

So far as no contrary intention is expressed in the mortgage deed, the mortgagee is allowed the premiums in respect of fire insurance, with the same priority and with interest at the same rate as the mortgage money¹. Where the mortgagor has covenanted to insure and has neglected to do so, the mortgagee, except by virtue of a statutory or express power, may not insure and charge the premiums as against a second mortgagee². Except under a power conferred by the terms of the mortgage or by statute, the mortgagee may not charge such premiums in his accounts³ unless he is in possession, in which case the premiums fall under just allowances⁴.

Where the security covers a life policy⁵, the mortgagee is allowed premiums paid by him for keeping the policy on foot⁶. A covenant by the mortgagee to pay the premiums does not deprive him of the right to add the premiums to his debt⁷. Where the insurance company is the mortgagee and the policy has been actually issued⁸, the company may, if so authorised under the mortgage, debit the mortgagor with the premiums and add to the mortgage debt⁹.

Where a shipowner had mortgaged ships to a firm of merchants, and had also insured ships¹⁰ through the firm's agency, and accounts were directed between the mortgagors and mortgagees, the mortgagees were held entitled to charge in the accounts the full insurance premiums without deducting customary commission allowed to them by the insurance offices¹¹.

In general, the mortgagee will be allowed sums which are properly expended for the preservation of the mortgaged property, such as fines for the renewal of leases¹² and ground rent¹³. Such advances, however, follow the principal debt, and, if the right to recover this is postponed, the right to recover salvage payments out of the property is also postponed¹⁴.

¹ See the Law of Property Act 1925 s 101(1)(ii), (4); and PARA 227. As to the application of the insurance money see PARA 199; and as to a joint insurance by mortgagor and mortgagee see *Rogers v Grazebrook* (1842) 12 Sim 557.

- 2 *Brooke v Stone* (1865) 34 LJCh 251.
- 3 *Dobson v Land* (1850) 8 Hare 216; *Bellamy v Brickenden* (1861) 2 John & H 137.
- 4 *Scholefield v Lockwood (No 2)* (1863) 11 WR 555.
- 5 As to life policies generally see **INSURANCE** vol 25 (2003 Reissue) PARA 525 et seq.
- 6 *Bellamy v Brickenden* (1861) 2 John & H 137; *Gill v Downing* (1874) LR 17 Eq 316.
- 7 *Shaw v Scottish Widows' Fund Assurance Society* (1917) 87 LJCh 76.
- 8 *Grey v Ellison* (1856) 1 Giff 438.
- 9 *Earl of Fitzwilliam v Price* (1858) 4 Jur NS 889. See also *Browne v Price* (1858) 4 Jur NS 882. For a direction for account of premiums paid by the mortgagee see 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1885. In Ireland, where salvage payments are more readily recognised, a second mortgagee may have priority for premiums paid by him: see *Re Power's Policies* [1899] 1 IR 6, CA; and cf **LIEN** vol 68 (2008) PARAS 870-877. As to lien by payment of premiums see **INSURANCE** vol 25 (2003 Reissue) PARA 560.
- 10 As to marine insurance generally see **INSURANCE** vol 25 (2003 Reissue) PARA 215 et seq.
- 11 *Baring v Stanton* (1876) 3 ChD 502, CA. See also *Leete v Wallace* (1888) 58 LT 577 (agreement that premiums on policy effected on mortgagor's life be secured on mortgaged premises; full amount of premiums paid allowed to mortgagees, without deducting commission received by their solicitor from insurance offices).
- 12 *Manlove v Bale and Bruton* (1688) 2 Vern 84; *Lacon v Mertins* (1743) 3 Atk 1 at 4; *Woolley v Drag* (1795) 2 Anst 551; *Bishop v Mantell* (1807) 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 1886; *Hamilton v Denny* (1809) 1 Ball & B 199 at 202. As to the conversion of renewal fines on perpetually renewable leases see the Law of Property Act 1922 s 145, Sch 15 paras 5(1), 6, 7(1), 12; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 541.
- 13 *Hill v Browne* (1844) Drury temp Sug 426; *Brandon v Brandon* (1862) 10 WR 287.
- 14 *Burrowes v Molloy* (1845) 2 Jo & Lat 521.

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748. Expenses of management.

In the absence of special agreement a mortgagee is not entitled to any remuneration for his special trouble in relation to the mortgaged property and, therefore, when in possession may not charge for work done by himself in collection of rents and management¹, but he may employ a house or land agent or a bailiff at commission or a salary where the work is so troublesome that in the ordinary course he would do this if the property were his own, and he is allowed the expense so incurred in his accounts². It is not a matter of course to allow the expense of a collector³. The mortgagee may, however, stipulate for payment for his own work⁴ and, if the stipulation is free from any circumstances of oppression or unfair dealing, effect will be given to it⁵. Effect will not be given to such a stipulation as between solicitor-mortgagee and mortgagor where the mortgagor has had no independent advice⁶. Where the mortgagee is a company, it may employ its own directors at remuneration to do work in connection with the property and charge this against the mortgagor in addition to its own agreed remuneration⁷.

1 *Langstaffe v Fenwick, Fenwick v Langstaffe* (1805) 10 Ves 405; *Sclater v Cottam* (1857) 5 WR 744; *Re Wallis, ex p Lickorish* (1890) 25 QBD 176 at 182, CA. See also *Nicholson v Tutin (No 2)* (1857) 3 K & J 159.

2 *Bonithon v Hockmore* (1685) 1 Vern 316; *Godfrey v Watson* (1747) 3 Atk 517; *Davis v Dendy* (1818) 3 Madd 170; *Leith v Irvine* (1833) 1 My & K 277 at 295-296; *Sclater v Cottam* (1857) 5 WR 744; *Eyre v Hughes* (1876) 2 ChD 148 at 161; *Re Wallis, ex p Lickorish* (1890) 25 QBD 176, CA.

3 *Union Bank of London v Ingram* (1880) 16 ChD 53 at 56.

4 Formerly such a stipulation was void as tending to oppression or usury, and as a collateral advantage (*French v Baron* (1740) 2 Atk 120; *Scott v Brest* (1788) 2 Term Rep 238 at 241; *Chambers v Goldwin* (1804) 9 Ves 254 at 271; *Barrett v Hartley* (1866) LR 2 Eq 789 at 795; *Comyns v Comyns* (1871) 5 IR Eq 583; *Eyre v Hughes* (1876) 2 ChD 148; *Field v Hopkins* (1890) 44 ChD 524 at 530 per Kay J (on appeal (1890) 44 ChD 524, CA)), although the mortgagee might stipulate for the appointment of a receiver to be paid by the mortgagor (see *Chambers v Goldwin*; *Langstaffe v Fenwick*, *Fenwick v Langstaffe* (1805) 10 Ves 405). In principle, however, there is now no objection to it (*Biggs v Hoddinott*, *Hoddinott v Biggs* [1898] 2 Ch 307, CA; *Bath v Standard Land Co Ltd* [1911] 1 Ch 618, CA), so far as the stipulation is confined to the continuance of the mortgage security (*Browne v Ryan* [1901] 2 IR 653, CA; *Noakes & Co Ltd v Rice* [1902] AC 24, HL; *Bradley v Carritt* [1903] AC 253, HL). Cf *Maxwell v Tipping* [1903] 1 IR 499. As to collateral benefits see PARA 319.

5 See *Barrett v Hartley* (1866) LR 2 Eq 789.

6 *Eyre v Hughes* (1876) 2 ChD 148. See also **LEGAL PROFESSIONS** vol 66 (2009) PARA 808.

7 *Bath v Standard Land Co Ltd* [1911] 1 Ch 618, CA, disapproving *Kavanagh v Workingman's Benefit Building Society* [1896] 1 IR 56, CA.

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749. Expenses of sale.

The mortgagee is entitled to charge the expenses of any actual¹ or attempted² sale. In taking the accounts the mortgagor may be allowed credit for loss on realisation due to the mortgagee's negligence³, but acceptance of a cheque for the deposit which is dishonoured is not negligence so as to deprive the mortgagee of his right to the expenses⁴. The mortgagee cannot charge remuneration for his personal services in connection with the sale⁵ unless this is expressly agreed with the mortgagor⁶. Thus an auctioneer⁷ or a broker mortgagee⁸ may not charge a commission for selling.

1 *White v City of London Brewery Co* (1889) 42 ChD 237 at 243, CA.

2 *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA. See also *Thompson v Rumball* (1839) 3 Jur 53; *Sutton v Rawlings* (1849) 3 Exch 407; *Batten v Wedgwood Coal and Iron Co* (1884) 28 ChD 317.

3 *McHugh v Union Bank of Canada* [1913] AC 299, PC.

4 *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA.

5 See PARA 748.

6 Formerly such an agreement was void, as giving the mortgagee a collateral advantage: *Leith v Irvine* (1833) 1 My & K 277; *Broad v Selfe* (1863) 11 WR 1036; *James v Kerr* (1889) 40 ChD 449 at 459; *Field v Hopkins* (1890) 44 ChD 524 at 530 per Kay J (on appeal (1890) 44 ChD 524, CA); *The Benwell Tower* (1895) 72 LT 664. This reason does not now exist, but the agreement will not be enforceable after the redemption of the mortgage: see *Brown v Ryan* [1901] 2 IR 653, CA; and PARA 319.

7 *Matthison v Clarke* (1854) 3 Drew 3; *Furber v Cobb* (1887) 18 QBD 494 at 509, CA.

8 *Arnold v Garner* (1847) 2 Ph 231. As to the right of a solicitor-mortgagee to charge profit costs see the Solicitors Act 1974 s 58; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 941.

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750. Costs of transfer of mortgage.

A transferee of a mortgage may add the costs of the transfer to his security if the mortgagor has been required to pay the debt or if interest was in arrear; otherwise he may not¹.

¹ See *Re Radcliffe* (1856) 22 Beav 201; *Bolingbroke v Hinde* (1884) 25 ChD 795.

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(3) COSTS OF PROCEEDINGS BETWEEN THE MORTGAGEE AND THE MORTGAGOR OR SURETY

751. In general.

The mortgagee's costs, reasonably and properly incurred, of proceedings between himself and the mortgagor or his surety are allowable¹. The classic examples are proceedings for payment, sale, foreclosure or redemption² but nowadays the most common are those for possession of the mortgaged property preliminary to an exercise of the mortgagee's statutory power of sale out of court³ and those in which the mortgagor contends that the mortgage is void or voidable⁴.

Where, however, the mortgagee has sold the property, a claim brought by the mortgagor for an account of surplus proceeds of sale is not within the general rule as to costs⁵. The mortgagee must pay the costs if the proceedings have been occasioned by his refusal to render accounts or by his understating the amount due from him⁶.

Costs of proceedings relating to two mortgages which the mortgagee is not entitled to consolidate are apportioned rateably between the two estates⁷.

¹ *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26 at 33, [1990] 2 All ER 588 at 591, CA, per Nourse LJ. See also *Millar v Major* (1818) Coop temp Cott 550, sub nom *Millard v Magor* 3 Madd 433; *Lewis v John* (1838) 9 Sim 366; *Sandon v Hooper* (1843) 6 Beav 246 at 250; *Owen v Crouch* (1857) 5 WR 545; and see *Horlock v Smith* (1844) 1 Coll 287.

² As to foreclosure see PARA 566 et seq. As to proceedings for redemption see PARA 656 et seq.

³ *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26 at 33, [1990] 2 All ER 588 at 591, CA, per Nourse LJ. As to the statutory power of sale see PARA 443 et seq.

⁴ *Ramsden v Langley* (1705) 2 Vern 536; *Samuel v Jones* (1862) 7 LT 760. See also *Clark v Hoskins* (1868) 37 LJCh 561 at 569, CA; *Re Baldwin's Estate* [1900] 1 IR 15. See further *Sinfield v Sweet* [1967] 3 All ER 479, [1967] 1 WLR 1489; *Saunders v Anglia Building Society (No 2)* [1971] AC 1039, [1971] 1 All ER 243, HL (legal aid cases).

⁵ See *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588. See also *Millar v Major* (1818) Coop temp Cott 550, sub nom *Millard v Magor* 3 Madd 433; *Lewis v John* (1838) 9 Sim 366; *Sandon v Hooper* (1843) 6 Beav 246 at 250; *Owen v Crouch* (1857) 5 WR 545; and see *Horlock v Smith* (1844) 1 Coll 287.

6 *Williams v Jones* (1911) 55 Sol Jo 500. See also *Tanner v Heard* (1857) 23 Beav 555; *Charles v Jones* (1887) 35 ChD 544.

7 *De Caux v Skipper, Tee v De Caux* (1886) 31 ChD 635, CA (overruling *Clapham v Andrews* (1884) 27 ChD 679). As to consolidation see PARA 498 et seq.

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752. Costs of recovery of debt.

The mortgagee is allowed the costs of a claim to recover the mortgage debt, whether brought against the mortgagor¹ or a surety, and notwithstanding that the claim is unproductive through the surety's insolvency² or that the contract of suretyship is subsequent to the mortgage³. The mortgagee may also recover costs incidental to the dishonour of a bill or note⁴, and the costs of administration of a deceased mortgagor's estate if this is required for recovering the debt⁵.

1 *National Provincial Bank of England v Games* (1886) 31 ChD 582, CA. On this point *Lewis v John* (1838) 9 Sim 366 is overruled (*National Provincial Bank of England v Games* above at 593), although it has been objected that these costs are not costs in relation to the mortgage security (*Merriman v Bonner* (1864) 12 WR 461).

2 *Ellison v Wright* (1827) 3 Russ 458.

3 *Sachs v Ashby & Co* (1903) 88 LT 393.

4 *Aberdeen v Chitty* (1839) 3 Y & C Ex 379 at 382.

5 *Ramsden v Langley* (1705) 2 Vern 536; *Ward v Barton* (1841) 11 Sim 534. Costs of administration necessary for enabling the mortgagee to enforce his rights against the property are allowed (*Hunt v Fownes* (1803) 9 Ves 70) but costs of administration incurred by the mortgagor's representative without the mortgagee's request do not take priority to the mortgage (*Saunders v Dunman* (1878) 7 ChD 825).

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753. Statutory discretion.

The mortgagee does not usually require an order for costs since he is entitled to add his costs to the security¹. He may, however, wish to seek an order for costs if, for example, the security is inadequate or the mortgagor has obtained an order for costs against him: the court has a statutory discretion to award costs as between the parties to proceedings². A mortgagee also has the right in equity to reimbursement from the security of his costs, reasonably and properly incurred, of proceedings between himself and the mortgagor or his surety³. The mortgage deed also usually makes provision as to costs. The following principles emerge from the cases as to the relationship between the statutory discretion and the mortgagee's rights⁴:

102 (1) an order for the payment of costs of proceedings by one party to another party is always a discretionary order⁵;

103 (2) where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right⁶;

- 104 (3) the power of the court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from statute but from the power of courts of equity to fix the terms on which redemption will be allowed⁷;
- 105 (4) a decision by a court to refuse costs, in whole or in part, to a mortgage litigant may be a decision in the exercise of the statutory discretion or a decision in the exercise of the power to fix the terms on which redemption will be allowed or a decision as to the extent of a mortgagee's contractual right to add his costs to the security or a combination of two or more of these things⁸;
- 106 (5) a mortgagee is not to be deprived of a contractual or equitable right to add costs to the security merely by reason of an order for payment of costs made without reference to the mortgagee's contractual or equitable rights and without any adjudication as to whether or not the mortgagee should be deprived of those costs⁹.

1 See PARAS 739-740.

2 See the Senior Courts Act 1981 s 51; CPR 44.3; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1738 et seq; **JUDICIAL REVIEW** vol 61 (2010) PARA 681. As to the renaming of the Senior Courts Act 1981 see PARA 220 note 5.

3 See *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and PARAS 739, 751. The right is reflected in, but not extended by, CPR 48.3: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1806.

4 *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA. These principles must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

5 See the Supreme Court Act 1981 s 51; *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and **JUDICIAL REVIEW** vol 61 (2010) PARA 681. As to the exercise of the court's discretion in awarding costs and the amount of costs see CPR 44.3; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1738-1739.

6 See *Practice Direction about Costs* PD 43-48 para 50.3(2). As to the assessment of costs payable pursuant to a contract see PARA 740; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1806.

7 See *Practice Direction about Costs* PD 43-48 para 50.3(3); *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1806. As to the equity of redemption see PARA 302 et seq.

8 See *Practice Direction about Costs* PD 43-48 para 50.3(4); *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1806. The statements of case and the submissions made to the judge may indicate which of the decisions has been made: see *Practice Direction about Costs* PD 43-48 para 50.3(4); *Parker-Tweedale v Dunbar Bank plc (No 2)* above; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* above.

9 See *Practice Direction about Costs* PD 43-48 para 50.3(5); *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1806. See also PARAS 739-740.

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754. When costs are payable personally.

A mortgagor, or subsequent incumbrancer, who raises an untenable defence must pay personally any costs so occasioned for which the mortgagee's security is insufficient¹. In a

redemption claim, if the mortgagor fails to redeem, the claim is dismissed with costs to be paid by him personally².

1 *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507 at 512, CA; *Guardian Assurance Co v Lord Avonmore* (1873) 7 IR Eq 496. See also *Sharples v Adams* (1863) 1 New Rep 460.

2 See *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460 at 475, CA, where a first mortgagee was also third mortgagee. See also PARA 668. As to costs payable by a later mortgagee who fails to redeem see PARAS 669, 672. As to proceedings for redemption see PARA 656 et seq.

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755. Assessment of contractual costs.

The mortgagee does not need to apply for an order for those costs that he has a contractual right to recover out of the mortgage funds¹, and nor do those costs have to be assessed².

Where the contract entitles a mortgagee either to add the costs of litigation relating to the mortgage to the sum secured by it or to require a mortgagor to pay those costs, or to do both things, the mortgagor may apply to the court for a direction that an account of the mortgagee's costs be taken³, and may then dispute an amount in the mortgagee's account on the basis that it has been unreasonably incurred or is unreasonable in amount⁴. Where a mortgagor disputes an amount, the court may make an order that the disputed costs are assessed⁵.

1 *Practice Direction about Costs* PD 43-48 para 50.2(2).

2 *Practice Direction about Costs* PD 43-48 para 50.2(1). As to the assessment of costs payable pursuant to a contract see **CIVIL PROCEDURE** vol 12 (2009) PARA 1806.

3 *Practice Direction about Costs* PD 43-48 para 50.4(1). The court may direct that a party file an account: see CPR r 25.1(1)(n); and **CIVIL PROCEDURE** vol 11 (2009) PARA 315; **CIVIL PROCEDURE** vol 12 (2009) PARA 1525.

4 *Practice Direction about Costs* PD 43-48 para 50.4(2).

5 *Practice Direction about Costs* PD 43-48 para 50.4(3). As to assessment see further PARA 741.

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756. Forfeiture of right to costs.

A mortgagee will not be allowed costs or expenses unreasonably or improperly incurred¹ or incurred otherwise than in enforcing or preserving his security². In these cases he may either be made to pay costs or merely be deprived of costs³. An order for an account to be taken including the mortgagee's assessed costs of the claim does not prevent an adverse order as to costs if reason for this subsequently appears⁴.

1 See *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA. See also CPR 48.3(1); *Practice Direction about Costs* PD 43-48 para 50.1; and PARA 741. The mortgagee will forfeit his

right to costs if there is such inequitable conduct on his part as to amount to a violation or culpable neglect of duty under the mortgage contract, or if his conduct as mortgagee is otherwise improper: see *Cotterell v Stratton* (1872) 8 Ch App 295 at 302 per Lord Selborne LC; *Cottrell v Finney* (1874) 9 Ch App 541 at 551; *Kinnaird v Trollope* (1889) 42 ChD 610 at 619; *Graham v Seal* (1918) 88 LJCh 31, CA. See also *Dunstan v Patterson* (1847) 2 Ph 341; *Re Watts, Smith v Watts* (1882) 22 ChD 5, CA. The authorities referred to in this paragraph must be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 *Wickenden v Rayson* (1856) 25 LJCh 641. As to the mortgagor's right to apply for the assessment of a bill of costs rendered to the mortgagee by his solicitor if the mortgagor is liable to pay see the Solicitors Act 1974 ss 70, 71; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 967 et seq. See also *Re Griffith, Jones & Co* (1883) 50 LT 434, CA; *Re Longbotham & Sons* [1904] 2 Ch 152, CA; *Re Paice and Cross* (1914) 58 Sol Jo 593.

3 See *Detillin v Gale* (1802) 7 Ves 583; *Harvey v Tebbutt* (1820) 1 Jac & W 197 at 202; *Kinnaird v Trollope* (1889) 42 ChD 610; and PARA 761.

4 *Ashworth v Lord* (1887) 36 ChD 545 at 551 (disagreeing on this point with *Wilson v Metcalfe* (1826) 1 Russ 530). See also *Quarrell v Beckford* (1816) 1 Madd 269 at 285.

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757. Refusal of tender.

If the mortgagor makes an unconditional tender of a sum sufficient to cover the amount secured by the mortgage, at a time when he is entitled to pay off the mortgage¹, and the mortgagee refuses to accept it, the mortgagee must pay the costs of a redemption claim thus made necessary². If he fails on part of his case, he may be disallowed costs of that part³. In order to throw the costs on the mortgagee, the mortgagor must make an actual tender⁴, notwithstanding that there is a dispute on a question of law⁵. In the absence of a tender, the mortgagee does not forfeit his right to costs merely by claiming more than is due to him⁶, or by bringing before the court a question as to the amount due, even though he is unsuccessful in his contention⁷. Such a claim is not necessarily vexatious, so as to deprive the mortgagee of the benefit of the general rule as to reimbursement of costs⁸. The fact that a deed contains a receipt for more than the sum actually advanced is not a ground for depriving the mortgagee of costs⁹.

1 *Edmondson v Copland* [1911] 2 Ch 301. The authorities referred to in this paragraph must be now read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq. As to tender see PARAS 332-333.

2 *Harmer v Priestley* (1853) 16 Beav 569. See also *Wilson v Cluer* (1841) 4 Beav 214; *Smith v Green* (1844) 1 Coll 555; *Roberts v Williams* (1844) 4 Hare 129; *Morley v Bridges* (1846) 2 Coll 621; *Hosken v Sincock* (1865) 12 LT 262; *Cottrell v Finney* (1874) 9 Ch App 541 at 551; *Graham v Seal* (1918) 88 LJCh 31, CA.

3 *Kinnaird v Trollope* (1889) 42 ChD 610 at 621.

4 *Gammon v Stone* (1749) 1 Ves Sen 339.

5 *Hodges v Croydon Canal Co* (1840) 3 Beav 86.

6 *Loftus v Swift and Governors of St Patrick's Hospital* (1806) 2 Sch & Lef 642 at 657; *Cotterell v Stratton* (1872) 8 Ch App 295; *Re Watts, Smith v Watts* (1882) 22 ChD 5, CA; *Kinnaird v Trollope* (1889) 42 ChD 610 at 619.

7 *Re Watts, Smith v Watts* (1882) 22 ChD 5 at 14, CA; *Stone v Lickorish* [1891] 2 Ch 363 at 370.

8 *Norton v Cooper* (1854) 5 De GM & G 728. As to the general rule see PARA 739.

9 *Dunstan v Patterson* (1847) 2 Ph 341 at 345.

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758. Proceedings instituted when nothing due.

If the mortgagee brings a claim for foreclosure¹, or resists redemption proceedings², when there is nothing due to him, he will have to pay, or will be deprived of, costs. If he is paid off before the claim is heard and carries it to a hearing, he may have his costs up to payment but must pay those incurred subsequently³.

1 *Binnington v Harwood* (1825) Turn & R 477 at 485; *Morris v Islip* (1856) 23 Beav 244. As to foreclosure generally see PARA 566 et seq. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 *Barlow v Gains* (1856) 23 Beav 244; *National Bank of Australasia v United Hand-in-Hand and Band of Hope Co* (1879) 4 App Cas 391 at 412, PC; *Wilson v Cluer* (1841) 4 Beav 214. If any money is due the mortgagee may have his costs: see *Barlow v Gains*; *Cassidy v Sullivan* (1878) 1 LR Ir 313; but see PARA 761 text to note 3. If the mortgagee has gone into possession, he may be deprived of his costs for failing to render accounts when required to do so: *Powell v Trotter* (1861) 1 Drew & Sm 388; *Cassidy v Sullivan*. As to the liability of a mortgagee in possession see PARA 427 et seq. As to the equity of redemption see PARA 302 et seq; and as to proceedings for redemption see PARA 656 et seq.

3 *Gregg v Slater* (1856) 22 Beav 314; *Seal v Kemsley* [1883] WN 122, CA. See also *Montgomery v Calland* (1844) 14 Sim 79.

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759. Unsuccessful denial of mortgagor's right or untenable claim.

If the mortgagee unsuccessfully denies or resists the mortgagor's right to redeem, whether on the ground that it has been extinguished¹, or otherwise², he is liable for the costs so occasioned. Usually the costs will not be payable to the mortgagor personally; they will be set off on his redeeming³. A first mortgagee must pay the costs if he sets up an unsuccessful claim to consolidate⁴, or refuses to allow the mortgagor to redeem on the ground that a subsequent incumbrancer wishes to do so⁵, or on any other ground involving an untenable claim on his part⁶. The mortgagee is, however, entitled to his costs so far as proceedings were necessary for redemption⁷, and he will not be deprived of costs if a specific, but unsuccessful, charge of fraud is made against him⁸.

1 *Baker v Wind* (1748) 1 Ves Sen 160; *Harvey v Tebbutt* (1820) 1 Jac & W 197 at 202; *National Bank of Australasia v United Hand-in-Hand and Band of Hope Co* (1879) 4 App Cas 391 at 412, PC. See also *Henderson v Astwood*, *Astwood v Cobbold*, *Cobbold v Astwood* [1894] AC 150 at 162, PC. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 See *England v Codrington* (1758) 1 Eden 169, where a mortgagee who wrongfully claimed that the conveyance to him was an absolute one was held liable to pay the costs of redemption. See also *Robarts v*

Jefferys (1830) 8 LJOS Ch 137; *Fleming v Self* (1854) 3 De GM & G 997 at 1029; *Cowdry v Day* (1859) 1 Giff 316 at 325.

3 *Wheaton v Graham* (1857) 24 Beav 483; *Forbes v Jackson* (1882) 19 ChD 615 at 623.

4 *Squire v Pardoe* (1891) 40 WR 100, CA. As to consolidation see PARA 498 et seq. A mortgagee was also formerly liable to pay the costs where he set up an unsuccessful claim to tack: see *Lacey v Ingle* (1847) 2 Ph 413 at 424; *Credland v Potter* (1874) 10 Ch App 8 (where, however, as there had been a want of caution on the part of the second mortgagee, the first mortgagee was only deprived of costs); *Kinnaird v Trollope* (1889) 42 ChD 610 at 621 (where the mortgagees were not allowed costs of their unsuccessful claim). See also *Forbes v Jackson* (1882) 19 ChD 615 at 622. As to the statutory restriction of the right to tack see PARAS 264-265.

5 *Tomlinson v Gregg* (1866) 15 WR 51. As to the costs of successive incumbrancers see PARA 763.

6 *Hall v Heward* (1886) 32 ChD 430, CA (where the mortgagee of real and personal estate insisted that the mortgagor's executrix was entitled to redeem only the personal estate); *Heath v Chinn* (1908) 98 LT 855 at 858. The mortgagee is not deprived of his costs if he brings forward a case which is fairly open to argument: *Bird v Wenn* (1886) 33 ChD 215 at 219. Cf *Tarn v Turner* (1888) 39 ChD 456 at 467, CA; *Deeley v Lloyds Bank Ltd (No 2)* (1909) 53 Sol Jo 419.

7 *Detillin v Gale* (1802) 7 Ves 583; *Harvey v Tebbutt* (1820) 1 Jac & W 197. As to proceedings for redemption see PARA 656 et seq.

8 *Hayward v Kersey* (1866) 14 WR 999.

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760. Default in reconveyance.

Upon a proper tender being made to him, the mortgagee is bound to give a statutory receipt¹, or, if appropriate, to execute a reconveyance² to the mortgagor or other person entitled. If a reconveyance is required, the draft must be previously submitted to the mortgagee's solicitor for approval and the engrossment then left for execution³. If the reconveyance is not ready to be handed over on the tender being made, the mortgagee loses his right to costs⁴.

1 As to statutory receipts see PARAS 645-646.

2 As to the costs of reconveyance see PARA 654.

3 See note 4.

4 *Rourke v Robinson* [1911] 1 Ch 480; *Graham v Seal* (1918) 88 LJCh 31, CA. See also *Cliff v Wadsworth* (1843) 2 Y & C Ch Cas 598, where the mortgagee had occasioned difficulties as to reconveyance. Cf *Webb v Crosse* [1912] 1 Ch 323, where the draft reconveyance was submitted at the same time as the intended payment. As to the mortgagee being deprived of costs where he has lost the title deeds see PARA 495. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

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761. Unreasonable or oppressive conduct.

In general, the mortgagee must pay the costs if his conduct has been unreasonable or oppressive, for example where he has withheld accounts¹, or the transaction is tainted with fraud², or only a small sum remains due to him and his conduct has been vexatious³, or he attempts to get the estate into his own hands⁴. Even though the mortgagee obtains the general costs, he will not get costs occasioned by charges against the mortgagor of fraud or other misconduct which fail⁵, or by unnecessary proceedings, such as the joinder of unnecessary parties, or the adducing of unnecessary evidence⁶. Where the mortgagor is allowed costs, these include the costs which he has to pay to a necessary party⁷.

1 *Detillin v Gale* (1802) 7 Ves 583. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 *Morony v O'Dea* (1809) 1 Ball & B 109.

3 *Snagg v Frith* (1846) 9 I Eq R 285, sub nom *Snagg v Frizell* 3 Jo & Lat 383; but see PARA 758 note 2.

4 See -- *v Trecothick* (1813) 2 Ves & B 181; but cf *Thornhill v Evans* (1742) 2 Atk 330.

5 See *West v Jones* (1851) 1 Sim NS 205 at 218; *Cockell v Taylor* (1851) 15 Beav 103 at 127.

6 *Audsley v Horn* (1858) 26 Beav 195; *Jones v Harris* (1887) 55 LT 884.

7 *Cockell v Taylor* (1851) 15 Beav 103.

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762. Effect of institution of administration proceedings by mortgagee.

Where the mortgagee, instead of relying on his security only, institutes a suit for the administration of the mortgagor's estate, he subjects himself to the ordinary rule in administration that the costs of all necessary and proper parties are a first charge upon the estate¹, and consequently these costs, including the expenses of sale, rank before the mortgage². If, however, the mortgagee institutes a suit to realise his security, and also for administration of the mortgagor's estate with a view to realising any deficiency out of the general estate, he is entitled, subject to the expenses of sale, to the entire produce of the mortgaged property towards payment of his debt and costs, and, as regards the general assets, the costs of all parties will be paid in the first place as in an ordinary administration suit³.

1 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 752.

2 *Armstrong v Storer* (1851) 14 Beav 535 at 538; *Walter v Stanton* (1862) 10 WR 570; *Re Spensley's Estate, Spensley v Harrison* (1872) LR 15 Eq 16; *Leonard v Kellett* (1891) 27 LR Ir 418 at 427. In a mortgagee's suit the expenses of sale are usually part of his own costs. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

3 *Tippling v Power* (1842) 1 Hare 405; *Tuckley v Thompson* (1860) 1 John & H 126; *Pinchard v Fellows* (1874) LR 17 Eq 421; *Leonard v Kellett* (1891) 27 LR Ir 418. Cf *White v Gudgeon* (1862) 30 Beav 545, where the costs of the administrator's suit were given priority on the ground of an overclaim by the mortgagee.

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763. Costs of successive incumbrancers.

Where there are successive incumbrancers, the rule as to the right of a mortgagee to reimbursement¹ in general prevails, and each incumbrancer adds his costs to his security². Accordingly, the costs are repayable in the same priority as the debts³, and in a priority suit the costs usually follow the mortgages, but the court has a discretion and may order one or other of the claimants to pay the costs if a case is made for it⁴. If a second mortgagee makes an unsuccessful claim to priority in the first mortgagee's foreclosure claim, the first mortgagee will add his ordinary foreclosure costs to his security, and the second mortgagee will pay the extra costs occasioned by the claim⁵. Where, however, a subsequent incumbrancer institutes proceedings, not in his own interest only, but to secure or to realise and distribute the mortgaged property⁶ or to ascertain the priority of the incumbrancers⁷, he is entitled to his costs, so far as incurred for these objects, as a first charge on the fund. This principle has been applied to administration proceedings brought by a subsequent incumbrancer⁸.

1 See PARA 739 et seq.

2 *Ford v Earl of Chesterfield (No 3)* (1856) 21 Beav 426 at 428; *Wright v Kirby* (1857) 23 Beav 463 at 467; *Johnstone v Cox* (1881) 19 ChD 17 at 19, CA; *Bird v Wenn* (1886) 33 ChD 215 at 219; *Pollock v Lands Improvement Co* (1888) 37 ChD 661 at 668. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

3 *Barnes v Racster* (1842) 1 Y & C Ch Cas 401 at 403; cf *Re Baldwin's Estate* [1900] 1 IR 15; *O'Meagher v Daly* [1917] 1 IR 341 (affd [1917] 1 IR 493, CA).

4 *Harpham v Shacklock* (1881) 19 ChD 207 at 215, CA.

5 *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 ChD 482 at 496, CA. As to foreclosure generally see PARA 566 et seq.

6 *White v Bishop of Peterborough* (1821) Jac 402; *Ford v Earl of Chesterfield (No 3)* (1856) 21 Beav 426; *Wright v Kirby* (1857) 23 Beav 463.

7 *Batten, Proffitt and Scott v Dartmouth Harbour Comrs* (1890) 45 ChD 612; *Carrick v Wigan Tramways Co* [1893] WN 98. See also the cases cited in note 2.

8 *Re Barne, Lee v Barne* (1890) 62 LT 922.

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764. Costs of parties claiming under mortgagee.

Where a sub-mortgagee is a necessary party, he has his costs against the mortgagee, and the mortgagee adds them to his own debt¹. This rule applies, however, only to costs due to persons claiming under the mortgagee². The mortgagee is not bound to pay, and add to his security, the costs of necessary parties claiming under the mortgagor, such as a trustee in bankruptcy³.

1 *Smith v Chichester* (1842) 2 Dr & War 393 at 404. Where possible, the sub-mortgagee should be joined as co-claimant: *Smith v Chichester* above at 404. When a mortgagee adopts the claim of a later mortgagee, the

later mortgagee's costs are payable before those of the earlier mortgagee: *Hutchinson v Cummins* (1920) 54 ILT 168. The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 See note 3.

3 *Hunter v Pugh* (1839) 1 Hare 307n; *Appleby v Duke* (1842) 1 Hare 303 (affd (1843) 1 Ph 272, where earlier decisions to the contrary were discussed); *Clarke v Wilmot* (1843) 1 Ph 276. As to the costs of disclaiming defendants see PARA 610.

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765. Priority of mortgagee's costs.

The mortgagee's right to costs extends to the costs of a claim in which his security is realised by sale¹, but his priority for his debt and costs over the costs of other parties depends on the object of the claim. If the claim is designed to give the mortgagee no benefit beyond the realisation of his security, or if the matter within the court's jurisdiction is in effect the equity of redemption only², the mortgagee is entitled to priority over the costs of other parties; this is so in an administration suit if it becomes necessary to sell the property but the mortgagee is not otherwise interested in the suit³. The proceeds of sale will be paid to the mortgagee so far as required for satisfaction of his principal, interest and costs, without deduction except of the expenses of sale⁴. As the mortgagee gets the benefit of the sale, the expenses of sale are a first charge⁵. This is so notwithstanding that he consents to⁶ or asks for⁷ a sale. Similarly, where the mortgagee comes in under an administration judgment and submits to have his rights determined, he will be entitled to principal, interest and costs out of the net proceeds of the property in priority to the costs of other parties⁸.

A mortgagee does not adopt a suit, so as to let in the costs in priority to his mortgage, by allowing his rights to be ascertained in it⁹, but, if he is a party to the proceedings, he must allow the costs of realisation to be first paid out of the proceeds of sale¹⁰.

1 *Wade v Ward* (1859) 4 Drew 602. It seems that an equitable mortgagee by deposit was entitled to costs, even though there was not an accompanying memorandum: *Connell v Hardie* (1839) 3 Y & C Ex 582; *R v Chambers* (1840) 4 Y & C Ex 54. Cf *Re v Gawan, ex p Barclay* (1855) 5 De GM & G 403 at 407. Formerly, he was not allowed the costs of establishing his right to a sale where there was no memorandum (*Re Wells, ex p Brightwen* (1818) 1 Swan 3; *Ex p Trew* (1818) 3 Madd 372; *Re Evans, ex p Robinson* (1832) 1 Deac & Ch 119), unless it had been dispensed with under a trade custom (*Re Davies, ex p Moss* (1849) 3 De G & Sm 599). The authorities referred to in this paragraph must now be read in the light of the Civil Procedure Rules: see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 See *Armstrong v Storer* (1851) 14 Beav 535 at 538. As to the equity of redemption see PARA 302 et seq.

3 *Hepworth v Heslop* (1844) 3 Hare 485; *Wonham v Machin* (1870) LR 10 Eq 447; *Hilliard v Moriarty* [1894] 1 IR 316, CA. See also *Clark v Doherty* [1916] 1 IR 257.

4 See note 5.

5 *Dighton v Withers* (1862) 31 Beav 423; *Re Oriental Hotels Co, Perry v Oriental Hotels Co* (1871) LR 12 Eq 126; *Batten v Wedgwood Coal and Iron Co* (1884) 28 ChD 317; *Lathom v Greenwich Ferry Co* (1895) 72 LT 790. This has not, however, always been recognised: see *Upperton v Harrison* (1835) 7 Sim 444; *Re Johnston, Millar v Johnston* (1888) 23 LR Ir 50; *Ross v Ross* (1892) 29 LR Ir 318. See also *Re Mackinlay, Ward v Mackinlay* (1864) 2 De GJ & Sm 358. As to costs in debenture holders' actions see **COMPANIES** vol 15 (2009) PARA 1387.

6 *Wild v Lockhart* (1847) 10 Beav 320; *Cutfield v Richards* (1858) 26 Beav 241; *Wade v Ward* (1859) 4 Drew 602; *Cook v Hart* (1871) LR 12 Eq 459. See also *Crosse v General Reversionary and Investment Co* (1853) 3 De GM & G 698.

- 7 *Wonham v Machin* (1870) LR 10 Eq 447.
- 8 *Re Marine Mansions Co* (1867) LR 4 Eq 601.
- 9 *Langton v Langton* (1855) 7 De GM & G 30 at 37.
- 10 *Re Regent's Canal Ironworks Co, ex p Grissell* (1875) 3 ChD 411 at 427, CA.

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(4) COSTS OF PROCEEDINGS BETWEEN THE MORTGAGEE AND THIRD PARTIES

766. General rule as to allowance.

The mortgagee is entitled to add to his security the costs, reasonably and properly incurred, of proceedings between himself and a third party where what is impugned is the title to the estate¹. In such a case the mortgagee acts for the benefit of the equity of redemption as much as for that of the security². However, where a third party impugns the title to the mortgage, or the enforcement or exercise of some right or power accruing to the mortgagee thereunder, the mortgagee's costs of the proceedings, even though they be reasonably and properly incurred, are not allowable³. Costs needlessly incurred are not allowed⁴. In order that costs properly incurred may be included, they must be claimed at the hearing⁵, and, if the claim is supported by proper evidence, an inquiry will be directed as to costs, charges and expenses properly incurred by the mortgagee in respect of his mortgage security, not being costs of the claim⁶.

1 *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA.

2 *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA. As to the equity of redemption see PARA 302 et seq.

3 *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA. See also *Dryden v Frost* (1838) 3 My & Cr 670 at 675. However, as to the alteration of this position by express contractual provisions see *Parker-Tweedale v Dunbar Bank plc (No 2)* above; *Gomba Holdings Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and PARA 740. See also *Saunders v Anglia Building Society (No 2)* [1971] AC 1039, [1971] 1 All ER 243, HL (legal aid case).

4 Cf *Macken v Newcomen* (1844) 2 Jo & Lat 16.

5 *Millard v Magor* (1818) 3 Madd 433, sub nom *Millar v Major* (1818) Coop temp Cott 550; *Ward v Barton* (1841) 11 Sim 534. Generally, when the account is to include more than principal, interest and costs of the proceedings, a special case must be made (*Bolingbroke v Hinde* (1884) 25 ChD 795), save that costs, charges and expenses, which are expressly included in the security, may be allowed without mention in the order: see *Blackford v Davis* (1869) 4 Ch App 304. The expenses of recovering possession (see PARA 751), and of necessary repairs and ordinary outgoings (see PARA 745) may be similarly allowed. As to accounts and inquiries see *Practice Direction--Accounts, Inquiries etc* PD 40; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1524 et seq.

6 *Merriman v Bonner* (1864) 12 WR 461. See also PARA 752. Where property which was the subject of a foreclosure claim was purchased by a public body under statutory powers and the compensation paid into court, and the mortgagee alleged that he had incurred costs in relation to the assessment of compensation beyond those which had been paid to him by the public body, he was held not to be entitled to an express direction for the allowance of the extra costs out of the fund in court, but merely to an order for inquiry in the ordinary form, as the costs, if found on the inquiry to have been properly incurred, would be allowable in taking the accounts without any express direction: *Rees v Metropolitan Board of Works* (1880) 14 ChD 372.

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767. Costs of defending title.

Costs incurred in asserting or defending the mortgagor's title to the mortgaged property are allowed¹, but not costs incurred in defending the mortgagee's title to the mortgage against a third person². Similarly, the mortgagee may not charge the costs of defending proceedings for trespass brought by a third person unless those costs were incurred in protecting the title to the estate³. Where in proceedings properly taken to protect the security the mortgagee has already received costs from a third party, he is entitled to add any deficiency to his security⁴. The proceedings must, however, be reasonably undertaken⁵. An equitable mortgagee may not have the costs of proceedings which are only suitable for a legal mortgagee⁶. The proceedings must not fail through the mortgagee's neglect⁷, so that a mortgagee who has sold under a contract which is unenforceable for misdescription may not charge the costs of a suit for specific performance⁸.

1 *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA. See also *Godfrey v Watson* (1747) 3 Atk 517 at 518; *Sandon v Hooper* (1843) 6 Beav 246; *Sclater v Cottam* (1857) 5 WR 744. A mortgagee has been allowed the costs of defending proceedings caused by the mortgagor including in the mortgage property which did not belong to him, but not the costs of an appeal: *Re Hofmann, ex p Carr* (1879) 11 ChD 62, CA. See also PARA 393. In a redemption claim the costs of a pending foreclosure claim must be provided for: *Ainsworth v Roe* (1850) 14 Jur 874. As to the equity of redemption see PARA 302 et seq; and as to proceedings for redemption see PARA 656 et seq. As to foreclosure see PARA 566 et seq.

2 *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA. See also *Parker v Watkins* (1859) John 133; *Re Smith's Mortgage, Harrison v Edwards* [1931] 2 Ch 168.

3 *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA. See also *Owen v Crouch* (1857) 5 WR 545. As to the right to protect title against third persons see PARA 396.

4 *Ramsden v Langley* (1705) 2 Vern 536. See also *Re Love, Hill v Spurgeon* (1885) 29 ChD 348, CA. See further PARA 753.

5 *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA.

6 *Dryden v Frost* (1838) 3 My & Cr 670.

7 *Burke v O'Connor* (1855) 4 I Ch R 418, where a claim for rent failed through being brought in the wrong person's name.

8 *Peers v Ceeley* (1852) 15 Beav 209. As to specific performance see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 801 et seq.